SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

No. 279.

WILLIAM DRURY, Appellant,

vs.

ANNIE E. HAYDEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED AUGUST 28, 1880.

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1 Pleas in the Circuit Court of the United States of America, for the Northern District of Illinois, began and held at the United States court rooms, in the city of Chicago, in the district aforesaid, before the Honorable Henry W. Blodgett, district judge of the United States of America for the Northern District of Illinois, at Chicago, in said district, on Wednesday, the thirteenth day of October, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

WILLIAM H. BRADLEY, *Clerk.*

ANNE E. HAYDEN
vs.
SOLOMON SNOW, ELIZABETH L. SNOW, WILLIAM C. Snow, Isaac M. Daggett, Sarah E. Daggett, William Drury, Edwin C. Larned, Trustee, and Roswell B. Bacon, Trustee. } In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that on this day, to wit, the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and seventy-eight, came Anne E. Hayden, complainant in this suit, by J. V. Le Moyne, Esq., her solicitor, and filed in the office of the clerk of the circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, her
2 bond for costs and bill of complaint in said entitled cause, which said bond for costs and bill of complaint are in the words and figures following, to wit:

Bond for Costs.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court, March Term, A. D. 1878.

ANNE E. HAYDEN
vs.
SOLOMON SNOW *et al.* } In Chancery.

I enter my security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by her, hereby agree and stipulate that execution may issue against my property for any costs taxed against her.

Dated this 26th day of January, A. D. 1878.

R. B. BACON.

(Endorsed:) Filed Jan'y 26th, A. D. 1878. W. H. Bradley, clerk.

Bill of Complaint.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Circuit Court of the United States for the Northern District of Illinois.

To the Judges of the Circuit Court for the Northern District of Illinois:

3 Anne E. Hayden, a citizen and resident of the State of Massachusetts, brings this her bill against Solomon Snow, Elizabeth L. Snow, his wife, William C. Snow, Isaac M. Daggett, Sarah E. Daggett, his wife, William Drury, Edwin C. Larned, trustee, and Roswell B. Bacon, trustee, all of whom are citizens and residents of the State of Illinois.

And thereupon your oratrix complains and says, that on the 28th day of July, A. D. 1875, the defendant, Solomon Snow, being then indebted to one Joseph E. Lockwood, of the city of Chicago, in said district, in the sum of twelve thousand dollars, for a portion of the purchase price of the premises hereinafter mentioned, made, endorsed, and delivered to the said Joseph E. Lockwood his two certain promissory notes of that date, each for the sum of six thousand dollars, payable to his own order, (and by him endorsed,) respectively in two and three years after and from this date with interest thereon, at the rate of eight per cent. per annum, from October 29th, A. D. 1875, payable semi-annually and with interest thereon, after the maturity of said notes, at the rate of ten per cent. per annum, both principal and interest payable at the Commercial National Bank, in said city of Chicago, as will more fully appear by said notes when produced in court.

Your oratrix further represents that to secure the payment of the said principal sum of twelve thousand dollars and interest thereon, according to the tenor and effect of said promissory notes, the said Solomon Snow and Elizabeth L. Snow, his wife, made, exe-
4 cuted, and delivered to the said Joseph E. Lockwood their certain deed of trust bearing date of the said 28th day of July, A. D. 1875, by which they conveyed to one Roswell B. Bacon in fee simple the following-described real property, with the appurtenances thereto belonging, known, and described therein, as follows: The east half ($\frac{1}{2}$) of lot number two (2) in block number thirty-three (33), in the original town of Chicago, situated in the city of Chicago, county of Cook, and State of Illinois, and in the district aforesaid, in trust nevertheless, for the purpose of securing the payment of the said principal sum of twelve thousand dollars, and interest thereon, according to the tenor and effect of said promissory notes so due to the said Joseph E. Lockwood, as aforesaid, and subject to a condition of defeasance upon the payment of said principal sum and interest thereon according to the tenor and effect of the said promissory notes, wh ch said deed of trust was duly acknowledged by the

said Solomon Snow and Elizabeth L. Snow, his wife, on the 31st day of July, A. D. 1875, and filed for record on the same day in the recorder's office of Cook county aforesaid, as by said deed of trust and its accompanying certificates of acknowledgment and recording will more fully appear when produced in court.

Your oratrix further represents that the said deed of trust first hereinbefore mentioned was made second and subject to a certain other incumbrance of twenty-eight thousand dollars upon said premises, as evidenced by the promissory note of said Solomon Snow, for said sum of twenty-eight thousand dollars, dated
5 July 28th, 1875, and payable five years from date, and secured to be paid by a certain trust deed, dated July 28th, 1875, made by the said Solomon Snow and Elizabeth L. Snow, his wife, to Edwin C. Larned, trustee, and duly recorded in the recorder's office of Cook county aforesaid.

Your oratrix further represents that the said Solomon Snow and Elizabeth L. Snow, his wife, by a warranty deed, dated December 14th, 1875, and recorded in the recorder's office of said Cook county on January 31st, 1876, conveyed all their right, title, interest, and equity of redemption in and to said mortgaged premises to one William C. Snow, bachelor, for the consideration therein expressed of eighty thousand dollars, subject, however, to the two incumbrances on said premises hereinbefore mentioned, as evidenced the one by the said trust deed to Edwin C. Larned, trustee, and the other by the said trust deed to Roswell D. Bacon, trustee. That afterwards the said William C. Snow, bachelor, as aforesaid, by a warranty deed, dated January 28th, 1876, and recorded in the recorder's office of said Cook county on the 31st day of January, 1876, conveyed all his right, title, interest, and equity of redemption, in and to said mortgaged premises, to one Isaac M. Daggett, for the consideration therein expressed of eighty-five thousand dollars, subject, however, to the incumbrances aforesaid; and that afterwards the said Isaac M. Daggett and and Sarah E. Daggett, his wife, for and in consideration that one William Drury would pay, or cause to be paid, to the legal holder or holders of the indebtedness secured by the two trust deeds hereinbefore described upon the said
6 mortgaged premises, and for other good and valuable consideration, by a warranty deed, dated April 12, 1876, and recorded in the recorder's office of said Cook county, on April 22d, 1876, conveyed to said William Drury, his heirs, executors, administrators, and assigns, all their right, title, interest, and equity of redemption, in and to said mortgaged premises, for the consideration therein expressed of seventy-five thousand dollars.

Your oratrix further represents that the said two incumbrances, as evidenced by the said trust deed of Solomon Snow and wife to Edwin C. Larned, trustee, and the said trust deed of Solomon Snow and wife to Roswell B. Bacon, trustee upon said mortgaged premses, formed a part of the consideration and purchase price of said premises in the said conveyance from said Isaac M. Daggett and

wife to said William Drury, and the said William Drury, in and by said conveyance, therein expressly agreed to assume and pay the same, by words and figures in said deed of conveyance contained, as follows:

"Subject to a certain trust deed executed by Solomon Snow and Elizabeth L., his wife, to E. C. Larned, trustee, to secure the payment of $28,000, dated July 28th, 1875, due five years from date, with interest at ten per cent. per annum, payable semi-annually; also subject to another trust deed executed by Solomon Snow and wife to R. B. Bacon, to secure the payment of twelve thousand dollars, dated July 28th, 1875, due two and three years from date, with interest at eight per cent. per annum, payable semi-annually.

"*Both of which said incumbrances the party of the second part herein assumes and agrees to pay.*"

7 And that the said William Drury has ever since continued to be and now is the owner of the equity of redemption in said mortgaged premises, by means whereof the said William Drury became liable to pay the said indebtedness as evidenced by and according to the tenor and effect of said promissory notes to the legal holder or holders thereof.

Your oratrix further represents that the said Joseph E. Lockwood, for a good and valuable consideration to him in hand paid by your oratrix, on or about the 1st day of November, A. D. 1876, and before the maturity of the said notes, or either of them, assigned and transferred to your oratrix the said two notes of six thousand dollars each, secured to be paid by the said trust deed of Solomon Snow and wife to Roswell B. Bacon, trustee, as hereinbefore stated; and that your oratrix is now the legal owner and holder of said notes and the said trust deed securing the same.

Your oratrix further represents that it was stipulated and provided in said deed of trust from Solomon Snow and wife, to Roswell B. Bacon, trustee, that in case of default in any of said payments of principal and interest, according to the tenor and effect of said promissory notes aforesaid, or either of them, or any part thereof, by the said party of the first part therein, their executors, administrators, and assigns, then in that case the whole of said principal sum thereby secured, and the interest thereon to the time of sale, might at once at the option (without notice to said party of the
8 first part therein, their executors, administrators and assigns) of the holder thereof became due and payable, and the said premises might be sold in the same manner and with the same effect as if the said indebtedness had matured.

Your oratrix further represents that only two installments of interest on each of said notes have been paid, and, as your oratrix is informed and believes, they were paid by the said William Drury; that default has been made in the payments of the semi-annual interest, that by the terms of said notes became due and payable on

each of them on April 28th, 1877, and that default has been made in the payment of the semi-annual interest due October 28th, 1877, on said note payable three years from its date, and that default has been made in the payment of the one of said principal notes that by its terms became due and payable two years from its date, to wit, on July 28th, 1877, and the interest accrued thereon.

And your oratrix further represents that by reason of such default she, as the legal holder of said notes, has elected to declare the said principal note dute by its terms three years from its date, together with all interest accrued thereon, to be now due and payable according to the provisions of said trust deed securing said notes.

Your oratrix further represents that there is now due and unpaid to your oratrix one of said notes for the principal sum of six thousand dollars with interest thereon from October 28th, 1876, at the rate of ten per cent. per annum, and also the other of said notes for the like principal sum of six thousand dollars with inter-
9 est thereon, from October 28th, 1876, at the rate of eight per cent. per annum, by means whereof the said mortgaged premises have become forfeited.

Your oratrix further represents that she has frequently, since the one of said notes matured by and in accordance with its terms, and the other became due by her election as aforesaid, requested the said defendants, and especially the said defendant William Drury, to pay the said notes and the interest accrued thereon, according to the tenor and effect of said notes, but he and they have refused so to do.

Your oratrix further represents that no proceedings at law have been had or taken to recover the said sums of money and interest thereon, or any part thereof, so due on said two notes as aforesaid.

And your oratrix well hoped that the said defendants would have complied with such, your oratrix's reasonable request, as in justice and equity ought to have been done, but now so it is that the said defendants refuse so to do.

Forasmuch, therefore, as your oratrix is without remedy in the premises, except in a court of equity, and to the end that the said defendants may, if they can, show why your oratrix should not have the relief hereby prayed, and they may full, true, and perfect answer make (not under oath, their answers under oath being hereby waived) to all and singular the premises, as fully and particularly as if the same were hereinafter repeated, and they thereunto particularly interrogated.

Your oratrix prays that an account may be taken, under
10 the direction of this honorable court, of what is due and owing to your oratrix for principal and interest on said promissory notes and the trust deed securing the same, and that said defendants may be decreed to pay to your oratrix what may be found due on taking such account as aforesaid, together with the costs of this suit, by a short day to be named and appointed by this

honorable court for that purpose, or in default of such payment that said premises may be sold by and under the direction of this court, subject, however, to said prior incumbrance on the same, and the proceeds of such sale be applied to the payment of the amount so found to be due to your oratrix as aforesaid, together with all costs and expenses, and that the said defendants, and all persons claiming under them, may be foreclosed and barred from all equity of redemption, or claim of, in and to said mortgaged premises and every part thereof, excepting such of said defendants as may have or claim an interest therein by, through, or under said trust deed from Solomon Snow and wife to said Edwin C. Larned, trustee, but not otherwise.

Your oratrix further prays that in case the proceeds from such sale of said mortgaged premises should not be sufficient to pay the amount so found to be due to your oratrix as aforesaid, together with the costs of this suit, then that a personal decree for said deficiency, or for whatever sum may then remain unpaid, may be rendered against the said defendant, William Drury, and in favor of your oratrix, and that your oratrix may have such other or further relief in the premises as to your honors shall seem just, and
11 as the nature of the case may require.

May it please your honor to grant unto your oratrix the writ of subpœna of the United States of America to be directed to the said Solomon Snow, Elizabeth L. Snow, William C. Snow, Isaac M. Daggett, Sarah E. Daggett, William Drury, Edwin C. Larned, trustee, and Roswell B. Bacon, trustee, thereby commanding them and each of them at a certain day therein to be specified, personally to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree herein as to your honors shall seem meet, and your oratrix will ever pray, etc.

ANNE E. HAYDEN, *Complainant*,
By J. V. LEMOYNE, *her Solicitor*.

J. V. LEMOYNE, *Compl'ts Sol'c'r*.

(Endorsed:) Filed January 26th, 1878. Wm. H. Bradley, clerk.

On the same day, to wit, the twenty-sixth day of January, A. D. 1878, a writ of subpœna issued out of said clerk's office against said defendants in said entitled cause, which said writ, with the memorandum, and also the return of the marshal thereto attached, is in the words and figures following, to wit:

Writ of Subpœna.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to Solomon Snow, Elizabeth
12 Snow, his wife, William C. Snow, Isaac M. Daggett, and Sarah E. Daggett, his wife, William Drury, Edwin C. Larned, trustee, and Roswell B. Bacon, trustee, greeting:

We command you, and every of you, that you appear before our judges of our circuit conrt of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of March next, to answer the bill of complaint of Anne E. Hayden, this day filed in the clerk's office of said court in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this 26 day of January, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 102d.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court at Chicago, aforesaid, on or before the day to which the above writ is returnable the complainants' bill will be taken
13 against them as confessed, and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

I have served the within writ within my district, in the following manner, to wit:

Upon Edwin C. Larned, therein named, on the 12th day of February, A. D. 1878, by personally delivering to him a true copy of the same on the aforesaid day. I also served the same upon the following-named defendants, not having been able to find them to serve personally, by leaving a true copy for each of them at their usual place of abode, with an adult person, and a member of their respective families, to wit:

Upon Solomon Snow, on the 12th day of February, A. D. 1878, with E. A. Snow; upon Elizabeth L. Snow, on the 12th day of February, A. D. 1878, with E. A. Snow; upon Mrs. C. Snow, on the 12th day of February, A. D. 1878, with E. A. Snow; upon Isaac M. Dagget, on the 12th day of February, A. D. 1878, with Ellen Allen; upon Sarah E. Daggett, on the 12th day of February, A. D. 1878, with Ellen Allen. I did not serve the other defendant,

having been unable to find either him, or that he had any residence within my district.

JESSE S. HILDRUP,
U. S. Marshal.
By L. O. GILMAN, *Deputy.*

Special Deputy's Returns.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

14 Know all men by these presents, that I have appointed, and by these presents do appoint, James A. Cummins my true and lawful deputy to execute the annexed writ, Anne E Hayden *vs.* Solomon Snow *et al*, and to make return of the execution thereof according to law.

[SEAL.] JESSE S. HILDRUP,
United States Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, by delivering a true copy thereof to William Drury, therein named, on the 12th day of February, A. D. 1878.

JESSE S. HILDRUP,
United States Marshal.
By JAMES A. CUMMINS,
Special Deputy.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

James A. Cummins, being duly sworn, deposes and says, that he served the annexed writ, as stated in the foregoing return, and that the expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

JAMES A. CUMMINS.

Subscribed and sworn to before me, this 13th day of Feb'y, A. D. 1878.

[SEAL.] A. McARTHUR,
Clerk Circuit Court, Mercer Co., Illinois.

(Endorsed:) Filed Feb. 22, A. D. 1878. W. H. Bradley, clerk.

15 On this day, to wit, the fourth day of March, A. D. 1878, came E. C. Larned, trustee, by Larned, Ryerson & Larned, his solicitors, who entered his appearance in said entitled cause. Which said appearance is in the words and figures following, to wit:

Appearance of E. C. Larned.

In the Circuit Court of United States, for the Northern District of Illinois.

ANNE E. HAYDEN
vs.
SOLOMON SNOW and others. } In chancery.

We hereby enter the appearance of Edwin C. Larned, trustee, defendant in the above-entitled cause.

LARNED, RYERSON & LARNED,
Sol'rs for EDWIN C. LARNED, *Trustee.*

MARCH 4TH, 1878.

(Endorsed): Filed M'ch 4, '78. W. H. Bradley, clerk.

On this day day, to wit, the fourth day of March, A. D. 1878, came Isaac M. Daggett, Sarah E. Daggett and William Drury, three of the defendants herein, by Bradley and Thomas, their solicitors, who enter their appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

16 *Appearance of the Daggetts and Drury.*

Circuit Court of the United States, Northern District of Illinois.

ANNE E. HAYDEN
vs.
SOLOMON SNOW, ELIZABETH L. SNOW, ISAAC M. DAGGETT, Sarah E. Daggett, William Drury, Edwin C. Larned, Trustee, and Roswell B. Bacon, Trustee. } In Chancery.

We hereby enter the appearance of Isaac M. Daggett, Sarah E. Daggett, and William Drury, three of the defendants in the above entitled suit, specially for the purpose of denying the jurisdiction of this court over this suit.

A. S. BRADLEY & H. H. THOMAS, *Solicitors.*

CHICAGO, *March 2d*, 1878.

(Endorsed:) Filed M'ch 4, 1878. W. H. Bradley, cl'k.

On this day, to wit, the fifth day of March, A. D. 1878, came Roswell B. Bacon, one of the defendants in this suit, and entered his appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance of R. B. Bacon.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court of the United States, Northern District of Illinois.

17 ANNE E. HAYDEN
vs.
SOLOMON SNOW, ELIZABETH L. SNOW, WILLIAM C. SNOW, ISAAC M. DAGGETT, SARAH E. DAGGETT, WILLIAM DRURY, EDWIN C. LARNED, Trustee, and ROSWELL B. BACON, Trustee. } In Chancery.

I hereby enter my appearance in the above-entitled cause.

ROSWELL B. BACON.

March 5th, 1878.

(Endorsed :) Filed Mch. 5, '78. W. H. Bradley, cl'k.

On this day, to wit, the fifth day of March, A. D. 1878, came William Drury, one of the defendants herein, by Smith & Burgett, his solicitors, who entered his appearance in said entitled cause. Which said appearance is at the words and figures following, to wit :

Appearance of William Drury.

UNITED STATES OF AMERICA, *Northern District of Illinois.*

In the Circuit Court of the United States for the Northern District of Illinois.

ANNE E. HAYDEN
vs.
SOLOMON SNOW, ELIZABETH L. SNOW, WILLIAM C. SNOW, Isaac M. Daggett, Sarah E. Daggett, William
18 Drury, Edwin C. Larned, Trustee, and Roswell Bacon, Trustee. } Bill.

We hereby enter the appearance of the said William Drury, defendant, in the above-entitled cause.

SMITH & BURGETT,
Solicitors for said William Drury, Defendant.

(Endorsed :) Filed Mch. 5, '78. W. H. Bradley, cl'k.

On this day, to wit, the twenty-third day of March, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the Honorable Henry W. Blodgett, judge, appears the following entry, to wit :

Entry.

ANNIE E. HAYDEN
vs.
SOLOMON SNOW *et al.* } In Chancery.

Now come Smith & Burgett, and by leave of court withdraw their appearance as solicitors for the defendant, William Drury, herein.

On this day, to wit, the second day of April, A. D. 1878, in the

record of the proceedings of said court, in said entitled cause, before the Honorable Henry W. Blodgett, judge, appears the following entry, to wit:

Entry.

19 ANNIE E. HAYDEN, *vs.* SOLOMON SNOW, *et al.* } In Chancery.

On motion, time for defendants to plead herein, is extended twenty days.

On this day, to wit, the nineteenth day of April, A. D. 1878, came William Drury, one of the defendants herein, and filed in said clerk's office his plea in said entitled cause. Which said plea is in the words and figures following, to wit:

Plea of Wm. Drury.

In the Circuit Court of the United States for the Northern District of Illinois.

ANNIE E. HAYDEN, Complainant, *vs.* SOLOMON SNOW, ELIZABETH L. SNOW WILLIAM C. Snow, Isaac M. Daggett, Sarah E. Daggett, William Drury, Edwin C. Larned, Trustee, Roswell B. Bacon, Trustee, Defendants. } Bill in Equity.

And the said William Drury, in his own person, comes and defends, &c., and says that before, on, and ever since the 28th day of July, A. D. 1875, (the date at which the alleged trust mortgage in the complainant's bill mentioned was executed,) he, the said William Drury has been a citizen and resident of the State of Illinois, and that Joseph E. Lockwood, (the person to whom the indebtedness secured in said trust mortgage was originally contracted
20 and for whose exclusive benefit and use said trust mortgage was originally made,) before, on, and ever since said 28th day of July, A. D. 1875, has been a citizen of said State of Illinois.

All which matters and things, this defendant is ready to verify, and prays the judgment of this hon. court, if the court here will take cognizance of the complainant's action, aforesaid.

WM. DRURY.

I certify that in my opinion the foregoing plea of William Drury, one of the defendants to the bill of complaint of Annie E. Hayden, complainant, is well founded in law, and proper to be filed in the above case.

A. S. BRADLEY,
Sol'r & of Counsel for said Def't.

UNITED STATES OF AMERICA,
Northern District of Illinois,
State of Illinois, Mercer County, } *ss:*

William Drury, being duly sworn, does depose and say that he is one of the defendants in the above-entitled suit. That he has read the foregoing plea subscribed by him, and knows the contents thereof, and that the same is true in point of fact.

JAMES H. CONNELL, [SEAL.]
Notary Public.

(Endorsed:) Filed Apr. 19, 1878. Wm. H. Bradley, cl'k.

On this day, to wit, the seventeenth day of May, A. D. 1878, in the record of the proceedings of said court in said entitled
21 cause, before the Honorable Henry W. Blodgett, judge, appears the following entry, to wit:

Entry.

ANNIE E. HAYDEN
vs.
SOLOMON SNOW, *et al.* } In Chancery.

Now come the parties, the complainant and defendant, Wm. Drury, by their solicitors, and now comes on to be heard the plea of the said defendant, William Drury, to jurisdiction herein, and after hearing the same the court overrules said plea and grants leave to said defendant, Wm. Drury, to answer the bill herein within twenty days. And it appearing to the court that the defendants, Solomon Snow, Elizabeth L. Snow, William C. Snow, Isaac M. Daggett, Sarah E. Daggett, Edwin C. Larned, trustee, and Roswell B. Bacon, trustee, had been duly served with process or had appeared herein and had failed to answer to the complainant's bill of complaint herein, in conformity with the rules and practice of this court, and they being now each three times solemnly called, come not, but make default.

It is thereupon considered by the court that their defaults be entered and that the complainant's bill of complaint, and the matters and things therein contained be taken as confessed and true as against them.

On this day, to wit, the fifth day of June, A. D. 1878, came William Drury, one of the defendants herein, by his solicitors, and filed in said clerk's office his answer in said entitled cause.
22 Which said answer is in the words and figures following, to wit:

Answer of Wm. Drury.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

ANNIE E. HAYDEN
vs.
SOLOMON SNOW, ELIZABETH SNOW, WILLIAM C. SNOW, ISAAC M. Daggett, Sarah E. Daggett, William Drury, Edwin C. Larned, trustee, and Roswell B. Bacon, trustee.

The answer of William Drury, one of the defendants to the bill of complaint of Annie E. Hayden, complainant.

This defendant, William Drury, reserving to himself all right of exception to the said bill of complaint, for answer thereto, says:

That he has been informed and believes it to be true, that on July 28, 1875, the defendant, Solomon Snow, was indebted to said Joseph E. Lockwood, mentioned in complainant's bill of complaint herein, in the sum of twelve thousand dollars, and that therefor said Snow executed his two certain promissory notes each for the sum of six thousand dollars, payable to his own order, two and three years after date respectively, at the Commercial National Bank in the city of Chicago, and that said Snow endorsed and delivered said
23 notes to said Lockwood, and that said Solomon Snow and the defendant, Elizabeth L. Snow his wife, made, executed, and delivered to said Lockwood their certain deed of trust bearing date July 28, 1875, conveying to the defendant, Roswell B. Bacon, the east half of lot two (2), in block thirty-three (33), in the original town of Chicago, in trust for the purpose of securing the payment of said sum of twelve thousand dollars as evidenced by said notes, and that said deed of trust to said Bacon was made subject to a certain other deed of trust of said premises, dated July 28, 1875, executed by said Solomon Snow and Elizabeth L. Snow his wife, to the defendant, Edward C. Larned, in trust to secure the payment of one certain promissory note for twenty-eight thousand dollars, dated July 28, 1875, made by said Snow and payable five years after date, but for greater certainty this defendant craves leave to refer to said notes and deeds of trust when produced.

Further answering, this defendant says that he has been informed and believes it to be true, that said Solomon Snow and Elizabeth L. Snow, his wife, by warranty deed, dated December 14, 1875, conveyed all their right, title, interest, and equity of redemption in and to said premises to the defendant, William C. Snow; but this defendant denies that the consideration for said deed, to said Snow, was the sum of eighty thousand dollars, and that said Solomon Snow and Elizabeth L. Snow, his wife, conveyed said premises expressly subject to the lien of the two incumbrances, evidenced by said deed of trust to said Larned and said deed of trust to said Bacon, or either of them.

24 Further answering, this defendant says that said William C. Snow has not at any time hitherto, with said Solomon Snow, or with any other person, or for any consideration, assumed or agreed to pay, or cause to be paid, any indebtedness secured by said deeds of trust, or either of them; that no part of any indebted-

ness secured by said deeds of trust, or either of them, was deducted from the price paid or agreed upon between said Solomon Snow and William C. Snow, as the purchase price of said premises in the conveyance thereof to said William C. Snow by said warranty deed; and that said William C. Snow has not at any time hitherto become personally liable for the payment of any indebtedness secured by said deeds of trust, or either of them.

Further answering, this defendant says that he has been informed and believes it to be true, that by a warranty deed, dated January 28, 1876, said William C. Snow conveyed all his right, title, interest, and equity of redemption in and to said premises to the defendant, Isaac M. Daggett; but this defendant denies that the consideration for said deed was the sum of eighty-five thousand dollars, and that said Snow conveyed said premises to said Daggett expressly subject to the lien of the two incumbrances evidenced by said deed of trust, or either of them.

Further answering, this defendant says that said Daggett had not at any time hitherto with said William C. Snow, or with any other person, or for any consideration, assumed or agreed to pay, or cause to be paid, any indebtedness secured by said deeds of trust, or either of them; that no part of any indebtedness secured by said
25 deeds of trust, or either them, was deducted from the price paid or agreed upon between said William C. Snow and said Daggett, as the purchase price of said premises on the conveyance thereof to said Daggett by said warranty deed; and that said Daggett has not at any time hitherto become personally liable for the payment of any indebtedness secured by said deeds of trust, or either of them.

Further answering, this defendant says that it is true that by a warranty deed dated April 12, 1876, said Isaac M. Daggett, and the defendant, Sarah E. Daggett, his wife, conveyed to this defendant all their right, title, interest and equity of redemption in and to said premises, but this defendant denies that the consideration of said deed to this defendant was the sum of seventy-five thousand dollars; and this defendant further denies that the assumption by this defendant of the payment of any indebtedness secured by said deeds of trust, or either of them, constituted any part of the consideration of said deed to this defendant, or any part of the purchase price of said premises paid by this defendant to said Isaac M. Daggett or agreed upon between this defendant and said Daggatt on the conveyance thereof to this defendant by said warranty deed.

Further answering, this defendant says that it is true that said warranty deed of said premises made by said Isaac M. Daggatt and Sarah E. Daggart, his wife, to this defendant contained after the description of the premises conveyed, the following statement:

"Subject to a certain trust deed executed by Solomon Snow
26 and Elizabeth L., his wife, to E. C. Larned, trustee, to secure payment of twenty-eight thousand dollars ($28,000.00), exe-

cuted July 28, 1875, due five years from date, with interest at ten per cent. per annum, payable semi-annually.

"Also, subject to another trust deed executed by said Solomon Snow and wife to R. B. Bacon to secure the payment of twelve thousand dollars ($12,000), dated July 28th, 1875, due two and three years from date, with interest at eight per cent. per annum, payable semi-annually. *Both of which said incumbrances the party of the second part herein assumes and agrees to pay.*"

But this defendant [says] that he has not at any time hitherto with said Isaac M. Daggart, or with any other person, or for any consideration, assumed or agreed to pay or cause to be paid any indebtedness secured by said deeds of trust, or either of them; that the said clause of assumption contained in said warranty deed to this defendant, to wit:

"*Both of which said incumbrances the party of the second part herein assumes and agrees to pay,*" was inserted in said deed in and through the mistake of the scrivener that drew said deed and contrary to the intention and agreement and without the knowledge of the parties to said deed, or any of them, at the time of its execution and delivery to this defendant; that this defendant did not know or discover that said clause of assumption was contained in said deed until long after its execution and delivery to this defendant; that as soon as this defendant was informed and became aware that said warranty deed contained said clause of assumption this
27 defendant went immediately to said Daggett to have said clause of assumption stricken from said deed, and said deed corrected and made to conform to the intention and agreement of the parties thereto at the time of its execution and delivery to this defendant; that until informed by this defendant said Daggett did not know that said deed contained said clause; that upon being informed by this defendant of the insertion of said clause in said deed, said Daggett stated and acknowledged to this defendant that the insertion of said clause in said deed was contrary to the intention and agreement of both the parties to said deed at the time of its execution and delivery to this defendant, and was done by and through the mistake of the scrivener that drew the said deed; that thereupon said Daggett, in order to correct the mistake of said scrivener in the insertion of said clause of assumption in said deed, and to effectuate the intention and agreement of the parties to said deed at the time of its execution and delivery to this defendant, did by his instrument in writing, under his hand and seal, dated the twelfth day of July, A. D. 1877, long prior to the filing of complainants' bill of complaint herein, forever release and discharge this defendant of and from any and all liability, obligation, claim, demand, and right of action, of every nature whatsoever, arising or accruing out of or from any and every assumption of payment of and agreement to pay the incumbrances on said premises, created or evidenced by

said deeds of trust, or either of them, or either or any part of said incumbrances.

All of which matters and things this defendant is ready
28 and willing to aver, maintain, and prove as this honorable court shall direct; and this defendant prays to be hence dismissed with his costs in this behalf most wrongfully sustained.

WILLIAM DRURY.
By H. H. THOMAS and A. S. BRADLEY,
His Solicitors.

H. H. THOMAS and A. S. BRADLEY,
Def'ts' Solicitors.

SMITH & BURGETT, *Of Counsel.*

(Endorsed:) Filed June 5, 1878. W. H. Bradley, cl'k.

On this day, to wit, the thirteenth day of June, A. D. 1878, came the complainant, by his solicitor, and filed in said clerk's office his replication to the answer of William Drury, heretofore filed in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

In the Circuit Court of the United States, Northern District of Illinois. June Term, A. D. 1878.

ANNIE E. HAYDEN } In Chancery.
vs.
SOLOMON SNOW *et al.* }

The replication of Annie E. Hayden, complainant, to the answer of William Drury, defendant.

This repliant, saving and reserving to herself, now and at all times hereafter, all and all manner of benefit and advantage
29 of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant, for replication thereunto, says, that she will aver, maintain, and prove her bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by her said bill she has already prayed.

J. V. LEMOYNE,
Solicitor for Complainant.

(Endorsed:) Filed this 13th day of June, A. D. 1878. W. H. Bradley, clerk.

On this day to wit, the twenty-seventh day of July, A. D. 1878, in the record of the proceedings of said court in said entitled cause before the Honorable Henry W. Blodgett, judge, appears the following entry, to wit:

Entry.

ANNIE E. HAYDEN
vs.
SOLOMON SNOW *et al.* } In Chancery.

30 This cause having come on to be heard upon the motion of the complainant that it be referred to Henry W. Bishop, master in chancery of this court, to take the proofs therein and report the same to this court.

Now therefore on consideration thereof, it is hereby ordered that this cause be and the same is hereby referred to Henry W. Bishop, master in chancery of this court, to ascertain the amount due to complainant upon her notes and trust deed in said bill of complaint mentioned, and report the same to this court. Also, to take the proofs of the respective parties in regard to the allegations contained in said bill of complaint of said complainant and in the answer of the defendant, William Drury; that the said master first give notice to the said parties respectively of the time and place where such proof will be taken, and cause to come before him all such witnesses as the respective parties may desire, and to examine them severally on oath and reduce their testimony to writing, and report the same together with his conclusions to the court.

On this day to wit, the twenty-third day of January, A. D. 1879, in the record of the proceedings of said court in said entitled cause, before the Honorable Henry W. Blodgett, judge, appears the following entry, to wit:

Entry.

ANNIE E. HAYDEN
vs.
SOLOMON SNOW *et al.* } In Chancery.

On motion of complainant's solicitor time to take testimony herein is extended thirty days.

31 On this day, to wit, the twelfth day of April, A. D. 1879, in the record of the proceedings of said court, in said entitled cause, before the Honorable Henry W. Blodgett, judge, appears the following entry, to wit:

Entry.

ANNIE E. HAYDEN
vs.
SOLOMON SNOW *et al.* } In Chancery.

On motion and by agreement of the parties herein, time to take proofs herein is extended forty days.

Afterwards, to wit, on the twenty-second day of May, A. D. 1879, in the record of the proceedings of said court, in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

ANNIE E. HAYDEN
vs.
SOLOMON SNOW *et al.* } In Chancery.

On motion and upon stipulation, time for the defendant, William Drury, to take testimony herein is extended forty days.

32 Afterwards, to wit, on the first day of July, A. D. 1879, in the records of the proceedings of said court, in said entitled cause, before Honorable Henry W. Blodgett, judge, appears the following entry, to wit:

ANNIE E. HAYDEN
vs.
SOLOMON SNOW *et al.* } In Chancery.

On motion, time to take proofs herein is extended twenty days.

Afterwards, to wit, on the thirteenth day of February, A. D. 1880, in the record of the proceedings of said court, in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

ANNIE E. HAYDEN
vs.
SOLOMON SNOW *et al.* } In Chancery.

On motion of complainant's solicitor, it is ordered by the court that the report of Henry W. Bishop, Esq., a master in chancery of this court, showing the amount due the complainant, this day filed herein, be, and the same hereby is, by consent of the parties, in all things ratified and approved.

And, on motion, leave is given the complainant to file a supplemental bill herein, and the defendants therein are ruled to answer the same within five days.

33 On this day, to wit, the thirteenth day of February, A. D. 1880, came the complainant, by her solicitor, and filed in said clerk's office her supplemental bill in said entitled cause, which said supplemental bill is in the words and figures following, to wit:

Supplemental Bill.

UNITED STATES OF AMERICA,
Northern District of Illinois.

Circuit Court of the United States, Northern District of Illinois.

To the Honorable Judges of the Circuit Court of the United States for the Northern District of Illinois, in chancery sitting:

Your oratrix, Annie E. Hayden, a citizen and resident of the State of Massachusetts, respectfully represents unto your honors that on the 26th day of January, A. D. 1878, she exhibited her bill of complaint in this honorable court against Solomon Snow, Elizabeth L. Snow, William C. Snow, Isaac M. Daggett, Sarah E. Daggett, William Drury, Edwin C. Larned, trustee, and Roswell B. Bacon, trustee, all of whom were then citizens and residents of the State of Illinois, thereby praying for the foreclosure of a certain deed of trust made by the said Solomon Snow and Elizabeth L. Snow, his wife, and running to Roswell B. Bacon, trustee, bearing date July 28th, A. D. 1875, and given to secure the payment of the two notes of the said Solomon Snow, each for the sum of six
34 thousand dollars ($6,000).

Your oratrix further represents that in and by her said bill it was alleged, amongst other things, that your oratrix was the legal owner of said two six thousand dollar notes and the trust deed securing the same; also, that said trust deed was second and subject to a certain other trust deed bearing date July 20, 1875, made by the said Solomon Snow and Elizabeth L. Snow, his wife, to Edwin C. Larned, trustee, and given to secure the payment of the note of said Solomon Snow, for the sum of twenty-eight thousand dollars.

Your oratrix further represents that in and by her said bill it was alleged that the defendant, William Drury, was then the owner of the equity of redemption of the said mortgaged premises, and that in and by the deed of conveyance to him, the said Drury, he had expressly agreed to assume and pay the said notes as belonging to and now owned by your oratrix.

Your oratrix further represents that in and by her said bill of complaint she prayed, amongst other things, that in case the proceeds arising from the sale of said mortgaged premises should not be sufficient to pay the amount that might be found to be due to your oratrix, then that a personal decree for said deficiency might be rendered against the said defendant, William Drury.

Your oratrix further represents that said bill was taken as confessed against all of said defendants, excepting the defendant, William Drury, who appeared and put in his answer to said bill,
35 and your oratrix filed a replication thereto, as by the files of said cause will more fully appear.

Your oratrix further represents that said cause was on the 27th day of July, A. D. 1878, referred to Henry W. Bishop, Master

in chancery of this court to ascertain the amount due to your oratrix, and report the same to this court, that on the 13th day of February, A. D. 1880, the said Master filed his report in this court, in and by which said report, the sum of $15,194.21, was found to be due to your oratrix on said notes and trust deed, and that said cause is still pending and undetermined in this court.

Your oratrix, by way of supplement, further represents that after the filing of her said bill as aforesaid, Robert E. Kelly, the legal owner of the note for twenty-eight thousand dollars ($28,000.00), made by said Solomon Snow, and secured by a trust deed to Edwin C. Larned hereinbefore mentioned, filed his bill in this court to foreclose the equity of redemption of said William Drury, in and to the premises in question; that on the 27th day of June, A. D. 1878, a decree of foreclosure was rendered in said cause in favor of the said Kelly therein; that on the 26th day of July, A. D. 1878, the said premises were in pursuance of said decree, sold by Henry W. Bishop, one of the masters in chancery of this court to said Kelly, complainant, that no one of the defendants in said cause redeemed from said sale; and that on the 30th day of October, A. D. 1879, the period of redemption according to the statute in such case made and provided having expired, the said Henry W. Bishop,

36 Master in chancery as aforesaid, under and by virtue of the decree theretofore rendered, therein issued under his hand and seal a deed to said Robert E. Kelly, and that said Kelly is now the owner of the said premises, that the security of said mortgaged premises as to your oratrix has thereby become exhausted.

Wherefore your oratrix prays that the amount so found to be due to your oratrix by said Master in chancery upon said notes and trust deed may be declared a deficiency, the same as though a sale of the mortgaged premises had been had under a decree in this cause, and that the said defendant, William Drury, may by the decree of this court be required to pay the same to your oratrix, and that this, your oratrix's bill of complaint, may be deemed and taken as, and for, a bill of supplement to her said original bill, that the said defendant, William Drury, may be required to make answer to the same (but not under oath the answer under oath being hereby waived), and that your oratrix may have such other and further elief in the premises as shall be right and proper.

J. V. LE MOYNE,
Compl't's Sol'r.

(Endorsed:) Filed Feb'y 13, 1880. Wm. H. Bradley, cl'k.

37 On this day, to wit, the seventeenth day of February, A. D. 1880, came William Drury, one of the defendants herein, by his solicitors, and filed in said clerk's office his answer to the supplemental bill heretofore filed in said entitled cause; which said answer is in the words and figures following, to wit:

Answer to Supplemental Bill.

In the Circuit Court of the United States for the Northern District of Illinois.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

ANNIE E. HAYDEN } Supplemental Bill.
vs. }
SOLOMON SNOW *et al.* }

Answer of the defendant, William Drury, to the supplemental bill of Annie E. Hayden, complainant.

This defendant, saving and reserving to himself all right and benefit of exceptions to the said supplemental bill, for answer thereto says:

That he admits that the deed of trust described in said bill, wherein Solomon Snow and wife were the grantors and Roswell B. Bacon was grantee, as trustee, was a junior encumbrance on the premises described in the complainant's original bill of complaint, and that the said premises were subject to a prior encumbrance thereon in the form of a deed of trust thereof, wherein said Snow and wife were grantors and Edwin C. Larned was grantee, as trustee, which said deed of trust is described in the said supplemental bill of complaint and in the original bill of complaint of complainant.

38

That he admits that since the filing herein of the complainant's original bill of complaint a suit was begun in this court for the foreclosure of the said deed of trust, wherein said Edwin C. Larned was grantee, as trustee, by Robert E. Kelly, the holder of the notes secured by said deed of trust, complainant, in which suit this defendant, who was the owner of the equity of redemption of said premises, said Solomon Snow and wife, said Roswell B. Bacon, trustee as aforesaid, and others, were defendants. This defendant further admits that such proceedings were afterwards had in said suit wherein said Robert E. Kelly was complainant and said Solomon Snow and others were defendants; that a decree for the foreclosure of said deed of trust and sale of said premises for the satisfaction of the indebtedness secured thereby was rendered by this court on the 27th day of June, A. D. 1878; that under and pursuant to said decree, and for the satisfaction of the same, the said premises were sold by the master in chancery of this court on the 26th day of July, A. D. 1878, and were bid in by said Robert E. Kelly; that no redemption from such sale was ever made, and that said Master in chancery has heretofore made and delivered a deed of said premises to said Kelly, pursuant to said decree; that he admits that the defendant, Solomon Snow, is insolvent, was insolvent at the time of the filing of the complainant's original bill of complaint herein, and has ever since been insolvent.

And for further answer to the said supplemental bill of complaint

this defendant craves leave to refer to his answer to the complainant's original bill of complaint, and that the same may be considered an answer to the said supplemental bill.

39 And this defendant further answering, denies that the complainant is entitled to the relief, or any part thereof, in the said supplemental bill of complaint demanded, and prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM DRURY,
By J. M. H. BURGETT,
His Solicitor.

SMITH & BURGETT,
Defendants' Solicitors.

(Endorsed:) Filed Feb'y 17th, 1880. Wm. H. Bradley, clerk.

On this day, to wit, the twenty-third day of February, A. D. 1880, came the complainant by her solicitor and filed in said clerk's office her replication to the answer to the supplemental bill heretofore filed herein, which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

ANNIE E. HAYDEN } In Chancery.
vs.
SOLOMON SNOW *et al.* }

The replication of Annie E. Hayden, complainant in supplemental bill, to the answer of William Drury, defendant, thereto:

40 This repliant saving and reserving to herself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the said answer of the said defendant, for replication thereunto says, that she will aver, maintain, and prove her said supplemental bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, and avoided, traversed or denied, is true.

All which matters and things this repliant is ready to aver, main-

tain, and prove as this honorable court shall direct, and humbly prays as in and by her said supplemental bill she has already prayed.

J. V. LE MOYNE,
Sol'cr for Complainant.

(Endorsed :) Filed Feb. 23, 1880. W. H. Bradley, cl'k.

Afterwards, to wit, on the sixth day of July, A. D. 1880, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit :

41 ANNIE E. HAYDEN *vs.* SOLOMON SNOW *et al.* } In chancery.

It is ordered that this cause be submitted to the court on printed briefs to be furnished.

Final Decree.

Afterwards, to wit, on the thirteenth day of October, A. D. 1880, in the record of the proceedings of said court in said entitled cause, before Honorable Henry W. Blodgett, judge, appears the following entry, to wit :

ANNIE E. HAYDEN *vs.* SOLOMON SNOW, ELIZABETH L. SNOW, WILLIAM C. Snow, Issac M. Daggett, Sarah E. Daggett, William Drury, Edwin C. Larned, trustee, and Roswell B. Bacon, trustee. } In Chancer.

And now, on this day comes the complainant by J. V. LeMoyne, her solicitor, and it appearing to the court that all of said defendants have been duly served with process, or have duly entered their appearance herein, and that all of said defendants excepting the defendant William Drury, who has answered to the bill of complaint herein, having been severally three times called in open court, to plead, answer, or demur to the complainants' bill of complaint, come not, but herein made default; it is therefore ordered,
42 adjudged, and decreed that the same be taken for confessed against all of said defendants excepting the said defendant, William Drury.

And the court having heretofore ordered this cause to be referred to Henry W. Bishop, one of the masters in chancery of this court, to take proofs of the matters stated in the complainant's bill of complaint herein, and to compute the amount due upon the notes and trust deed mentioned in said bill; and the said master having made report thereof to the court by a report dated the sixth day of February, A. D. 1880, did therein find that there was due to the complainant upon the said notes and trust deed in said bill of complaint mentioned, the sum of fifteen thousand one hundred ninety-four

dollars and twenty-one cents, ($15,194.21,) which said report is hereby approved and affirmed by the court.

And thereupon this cause coming on for a final hearing upon the bill, answer of the defendant William Drury, replication thereto, supplemental bill of complaint, answer thereto of the defendant William Drury, replication thereto; the said report of said Master, the proofs taken herein, and upon the arguments of R. B. Bacon, counsel for complainant, and J. M. H. Burgett, counsel for the defendant William Drury; and the court being fully advised in the premises doth find that all the necessary persons have been made parties hereto.

43 That there is now due to the complainant upon the notes and trust deed, in her bill of complaint mentioned, the sum of fifteen thousand one hundred ninety-four dollars and twenty-one cents,($15,194.21,) as reported by said Master, with interest thereon, at the rate of six per cent. per annum, from the date of said Master's report, to wit, the sixth day of February, A. D. 1880. And the court doth further find, that since the institution of this suit, and while the same was pending and undetermined in this court, the said mortgaged premises, mentioned in complainant's bill of complaint, were, by virtue of a certain decree of sale and foreclosure of this court, rendered in a certain suit in this court, wherein one Robert E. Kelly was complainant, and Solomon Snow and others were defendants, sold, in payment and satisfaction of a certain incumbrance upon said mortgaged premises prior to that of the complainant in this cause; that the said Robert E. Kelly became the purchaser of said mortgaged premises at such sale; that there was no redemption from said sale; that the time for redemption has expired; that a deed has been issued by the said Master to the said Robert E. Kelly, and that thereby the said mortgaged premises, as a fund or security for the payment of the amount found to be due to the complainant herein, have

44 become spent and exhausted. And the court doth further find that the complainant is the legal owner and holder of the said notes and trust deed in said bill of complaint mentioned; that she purchased them for value before maturity, and without notice; that the said defendant, William Drury, is personally liable to the complainant as the legal owner and holder of said notes and trust deed for the payment of the same and interest thereon, according to the tenor and effect of said notes; that the security of said mortgaged premises has been exhausted, and that the amount herein found to be due to the complainant is declared to be a deficiency, for which the complainant is entitled to a personal decree against the said defendant, William Drury.

It is therefore ordered, adjudged, and decreed that the said defendant, William Drury, pay to the complainant in this cause the said sum of fifteen thousand one hundred ninety-four dollars and twenty-one cents, ($15,194.21,) with interest thereon, at the rate of six per cent. per annum, from and after said date of the sixth day of Feb-

ruary, A. D. 1880, together with her costs in this cause to be taxed; and that the said complainant have execution therefor.

45 On the same day, to wit, the thirteenth day of October, A. D. 1880, there was filed in said clerk's office the certificate of evidence in said entitled cause. Which said certificate of evidence is in the words and figures following, to wit:

Certificate of Evidence.

UNITED STATES OF AMERICA, *Northern District of Iltinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois. October Term, A. D. 1880.

ANNIE E. HAYDEN, Complainant,
vs.
SOLOMON SNOW, ELIZABETH L. SNOW, WILLIAM C. Snow, Isaac M. Daggett, Sarah E. Daggett, William Drury, Edwin C. Larned, Trustee, and Roswell B. Bacon, Trustee, Defendants. } In Chancery.

Be it remembered that on the trial of this cause in this term, there was offered and read in evidence the testimony taken in this cause, before Henry W. Bishop, Esq., master in chancery of this court, accompanying the report of said master, dated February 6, 6, A. D. 1880, and filed in this court February 13, A. D. 1880. And the defendant, William Drury, further introduced and read in evidence on his behalf, the depositions of Isaac
46 M. Daggett and Rodney M. Whipple, (and the exhibits accompanying such depositions,) taken in the city of New York, in the State of New York, before George W. Ellis, commissioner, July 11, 1879, which said depositions were filed in this court July 17, 1879. This was all the evidence offered on the trial of this cause.

In testimony whereof I have hereunto set my hand and seal.

H. W. BLODGETT, [SEAL.]
Judge of the District Court of the United States, for the Northern District of Illinois, sitting as a Judge of the Circuit Court of the United States for said District.

(Endorsed:) Filed Oct. 13th, 1880. Wm. H. Bradley, clerk.

47 *Report of Henry W. Bishop, Master, &c., with Exhibits and Testimony attached.*

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

ANNIE E. HAYDEN
vs.
SOLOMON SNOW, ELIZABETH L. SNOW, his wife, WILLIAM E. SNOW, Isaac M. Daggett, Sarah E. Daggett, his wife, William Drury, Edwin C. Larned, Trustee, and Roswell B. Bacon, Trustee.

Master's Report.

To the honorable the judges of said court:

The above-entitled cause having been referred to me as master in chancery of the said court, by an order of the said court heretofore entered herein, to wit, on the 27th day of July, A. D. 1878, to ascertain amount due complainant upon the notes and trust deed in the bill of complaint mentioned, and report the same to the court.

I do hereby report that having given notice to the parties interested that a hearing for the purposes in the said order expressed would be had before me, at my office No. 33 National Life Building, La Salle street, Chicago, on the 28th day of January, A.
48 D. 1879, I was attended on that day by R. B. Bacon, Esquire, for J. V. Le Moyne, Esq're, of counsel for complainant, who produced in evidence before me the bill of complaint herein, and a deed of trust dated the 28th day of July, A. D. 1875, made between Solomon Snow and Elizabeth Snow, his wife, party of the first part, and Roswell B. Bacon, party of the second part, as trustee, and William D. Kerfoot, successor in trust; also two (2) promissory notes, each dated July 28th, 1875, signed "Solomon Snow," and payable respectively as herein mentioned, being the deed of trust and promissory notes referred to and described in the said bill of complaint.

I was also attended on the said 28th day of January, A. D. 1879, by Messrs. Smith and Burgett, of counsel for said defendant, William Drury, and also by William C. Snow, who testified herein on behalf of the said complainant, and whose testimony was duly taken, is hereto annexed, and made a part hereof.

Counsel for complainant also offered in evidence certified copy of deed dated the 4th day of December, A. D. 1875, from Solomon Snow and Elizabeth L. Snow to William C. Snow; also a certified copy of deed dated the 28th day of January, A. D. 1876, from William C. Snow to Isaac M. Daggett; also a certified copy of deed dated the 12th day of April, A. D. 1876, from Isaac M. Daggett and Sarah E. Daggett, his wife, to William Drury.

I was again attended, by adjournment on the 18th day of July, A. D. 1879, and the 6th day of February, A. D. 1880, by said counsel for the complainant and the defendant, and also by William Drury and Lozenzo Pratt and Jones Hutchinson, each of whom testified herein, and their testimony was duly taken, is hereto annexed, and made a part hereof.

49 I further report that from an examination of the said bill of complaint, testimony, including the testimony of Isaac M.

Daggett and Rodney M. Whipple, which have been taken in the city of New York, on the 11th day of July, A. D. 1879, and which is on file herein, and the said two (2) promissory notes and deed of trust so as aforesaid produced in evidence before me, and from a computation made by me I find there is due and owing to the said complainant the sum of twelve thousand dollars ($12,000,) for the principal, and thirty-one hundred and ninety-four dollars and twenty-one cents for the balance of the interest hereon to the date of this report, making a total sum due and owing to the said complainant as the legal holder and owner of the said two (2) promissory notes secured by said deed of trust for principal and interest to the date of this report, of fifteen thousand one hundred and ninety-four dollars and twenty-one cents, ($15,194.21.)

I return all the documents used by me in preparing this report and make the same a part hereof.

All of which is respectfully submitted.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated Chicago, February 6th, 1880.

50 *Notes.*

"CHICAGO, *July 28th*, 1875.

"Two years after date I promise to pay to the order of myself six thousand dollars, with interest from October 29th, A. D. 1875, at the rate of eight per cent. per annum, payable semi-annually, at the Commercial National Bank of Chicago, with interest at the rate of ten per cent. after maturity.

"Value received.

"$6,000. "SOLOMON SNOW."

(Endorsed:) "Pay to the order of J. E. Lockwood. Solomon Snow, J. E. Lockwood. Chicago, June 20, '76. Rec'd two hundred and forty dollars, six months interest on within note. J. E. Lockwood. Oct. 29, '76. Interest paid to date. J. E. L."

51 "CHICAGO, *July 28th*, 1875.

"Three years after date I promise to pay to the order of myself six thousand dollars, with interest from October 29th, A. D. 1875, at the rate of eight per cent. per annum, payable semi-annually, at the Commercial National Bank of Chicago, with interest at the rate of ten per cent. after maturity. Value received.

"$6,000. SOLOMON SNOW."

[Endorsed:] "Pay to the order of J. E. Lockwood. Solomon Snow, J. E. Lockwood. Chicago, Jan. 20, '76. Rec'd two hundred and forty dollars, six months' interest, on within note. J. E. Lockwood. Oct. 29, '76, interest paid to date. J. E. L."

52 *Trust Deed from Solomon Snow to Roswell B. Bacon.*

"This indenture, made this twenty-eight day of July, in the year of our Lord one thousand eight hundred and sevety-five, between Solomon Snow and Elizabeth L. Snow, his wife, of the city of Chicago, Cook county, State of Illinois, party of the first part, and Roswell B. Bacon, of the city of Chicago, county of Cook, and State of Illinois, party of the second part, as trustees as hereinafter specified (and in case of the death, absence, or removal from said county of Cook, refusal or inability to act of said party of the second part, then William S. Kerfort, of said city of Chicago, shall be, and he is hereby, appointed and made successor in trust to said party of the second part, under this deed, for the uses and purposes hereinafter expressed, with the same power and authority as said trustee).

Witnesseth, that whereas the said Solomon Snow is justly indebted in the sum of twelve thousand dollars ($12,000), with interest thereon, as evidence by his two (2) promissory notes of even date herewith, all drawn by him, payable to his own order, and by him endorsed and delivered over, all bearing interest from the twenty-ninth (29th) day of October, A. D. 1875, at the rate of eight (8) per cent. per annum, payable semi-annually. The first of said notes being for the sum of six thousand dollars ($6,000), payable in two (2) years from date, and the second of said notes being for the sum
53 of six thousand dollars ($6,000), payable in three (3) years from date, with interest as aforesaid. Said notes bearing interest after maturity at the rate of ten (10) per cent. per annum, and being payable at the Commercial National Bank of Chicago.

And whereas the said party of the first part are desirous of securing the prompt and full payment of said promissory notes, and interest that may accrue thereon, in whose hands soever the same may be.

Now, therefore, the said party of the first part, in consideration of the premises, and for the purposes aforesaid, and in the further consideration of one dollar, to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed, hath and doth hereby grant, bargain, sell, and convey unto the said party of the second part, his successor in trust aforesaid, and his and their heirs and assigns, all the following-described lands and premises, situate in the city of Chicago, county of Cook, and State of Illinois, to wit: The east half of lot number two (2), in block number thirty-three (33), in the original town of Chicago, Cook county, Illinois, aforesaid.

To have and hold the same, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging to the said party of the second part, his successor in trust aforesaid, and his and their heirs and assigns, forever. In trust, nevertheless, that in case of default in the payment of the said

promissory notes, or either of them, or any part thereof,
54 according to the tenor and effect of said notes, or in case of waste or non-payment of taxes or assessments, or in case of the breach of any of the covenants or agreements herein mentioned, then and from thenceforth, it shall be lawful for the said party of the second part, or his successor in trust, on application of the legal holder of said promissory notes, or either of them, to enter upon, possess, hold, and enjoy the above-granted premises, and either with or without such entry, to sell and dispose of said premises hereby granted, and all right, title, benefit, and equity of redemption of said party of the first part, their heirs and assigns, therein, at public auction, at the northeast corner of the Court House square of said Cook county, in the city of Chicago, in the State of Illinois, or on said premises or on any part thereof as may be specified in the notice of such sale for the highest and best price the same will bring in cash, thirty days' previous notice of such sale having been given by publication once in each week for four successive weeks in the Chicago Legal News, or in any newspaper at that time published in said city of Chicago, and to make, execute, and deliver to the purchaser or purchasers at such sale good or sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds or avails of such sale, and the purchase money paid thereon after first paying all costs of advertising, sale, and conveyance, including the reasonable fees and commissions of the said party of the sec-
one part attorney's fees and all other expenses of this trust,
55 including all moneys advanced for insurance, taxes, and other liens or assessments, with interest thereon at ten per cent. per annum, then to pay the principal of said notes, whether due and payable by the terms thereof or not, and interest on said notes up to the time of such sale, rendering the overplus (if any) unto the said party of the first part, their legal representatives or assigns, on reasonable request; and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase money, which sale or sales so made shall be a perpetual bar, both in law and equity, against the said party of the first part, their heirs and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from, through, or under said party of the first part, or any of them.

And in case of a foreclosure of this trust deed, as provided by section thirteen of an act of the General Assembly of the State of Illinois, entitled "An act to revise the law in relation to mortgages of real and personal property," approved March 26, 1874, or under any law of this State, upon default and application made to the said party of the second part, or his successor in trust, as aforesaid, by any cestui que trust under this deed, it shall and may be lawful for the said party of the second part, in his own name or otherwise, by suit in any court of competent jurisdiction, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purposes herein specified by said party of the second

56 part, as such trustee, or as special commissioner, under order of court, and out of the proceeds of any such sale to first pay the costs of such suit, including his reasonable charges as attorney and solicitor therein, in addition to and besides the cost of advertising, sale, conveyance, and moneys advanced with interest, as above provided, then to pay the amount found by the court to be due and payable upon the indebtedness aforesaid.

And in case of any suit or proceeding at law or in equity, wherein said party of the second part shall be made a party by reason of his trusteeship under this deed, he shall be allowed and paid his reasonable costs, charges, attorney's and solicitor's fees in such suit or proceeding by said party of the first part, and the same shall be a further charge and lien upon said premises under this deed, to be paid out of the proceeds of sale thereof, if not otherwise paid by said party of the first part.

And in case of the appointment by any court of a new trustee to execute the trusts hereby created, the sum of one hundred ($100) dollars for the attorney's or solicitor's fees of the petitioner in such proceedings, and all other expenses of such appointment and the execution of said trust, shall be allowed and taken from the proceeds of the sale of said premises.

And in consideration of the money paid as aforesaid to the said party of the first part, and in order to create a first lien and incumbrance on said premises under this deed for the purpose
57 aforesaid, and to carry out the foregoing specific application of the proceeds of any sale that may be made by virtue hereof, the said party of the first part doth hereby release and waive all right under and benefit of the exemption and homestead laws of the State of Illinois in and to the lands and premises aforesaid, and the proceeds of sale thereof, and agree to surrender up possession thereof to the purchaser or purchasers at such sale peaceably on demand.

And the said party of the second part, with or without readvertising, is hereby authorized and empowered to postpone or adjourn said sale from time to time at his discretion; and also to sell the said premises entire without division or in parcels, as he may prefer or think best.

And the said Solomon Snow for himself and his heirs, executors, and administrators covenants and agrees to and with the said party of the second part, his successor in trust hereinbefore named and their assigns, that at the time of the ensealing and delivery of these presents he is well seized of said premises in fee simple, and has good right, full power, and lawful authority to grant, bargain, and sell the same in manner and form as aforesaid; that the same are free and clear of all liens and incumbrances whatsoever, (unless as hereinafter specified;) that the said party of the first part will in due season pay all taxes and assessments on said premises, and exhibit once a year, on demand, receipts of the proper persons to said party of the second part, showing payment thoreof until the

58 indebtedness aforesaid shall be fully paid. And in case of the refusal or neglect of said party of the first part, or either of them, thus to pay taxes, said party of the second part, or his successor in trust, or the holder of said notes, or either of them may pay such taxes; and all moneys thus paid, with interest thereon at ten per cent. per annum shall become so much additional indebtedness, secured by this deed of trust, and to be paid out of the proceeds of sale of the lands and premises aforesaid, if not otherwise paid by said party of the first part.

This conveyance being made subject to a certain encumbrance of twenty-eight thousand dollars ($28,000) now upon the above-described premises, secured to be paid by a certain trust deed, dated July 28th, A. D. 1875, executed by the said first party to Edwin C. Larned, trustee, and being duly recorded in the records of Cook county, Illinois.

In case of full payment of all the indebtedness aforesaid prior to any sale of the lands and premises above-described, or any part thereof, and a performance of the covenants and agreements herein made to be performed by the said party of the first part, then a reconveyance to be made to the said party of the first part, their heirs, or assigns at their expense. And in case any notice of sale of said premises, or any part thereof, shall be published, and the said indebtedness shall be paid after any such publication, and before sale. The said party of the first part shall pay for such publication, and also attorneys and trustees fees for services, and

59 all expenses therein to the date of such payment.

And it is stipulated and agreed, that in case of default in any of said payments of principal or interest, according to the tenor and effect of said promissory notes aforesaid, or either of them or any part thereof, or of a breach of any of the covenants or agreements herein by the party of the first part, their executors, administrators or assigns, then, and in that case, the whole of said principal sum hereby received, and the interest thereon to the time of sale, may at once at the option (without notice thereof to said party of the first part, their heirs, assigns or legal representatives) of the legal holder thereof become due and payable, and the said premises be sold in the manner and with the same effect as if the said indebtedness had matured.

And said party of the first part for themselves and their heirs and assigns, do further covenant and agree to and with said party of the second part, his successor in trust aforesaid, and his heirs and their assigns, that in case of a sale and conveyance as aforesaid of said premises any deed or deeds of conveyance made in pursuance of such sale shall be prima facie evidence of the due compliance with and performance of the terms, conditions, and requirements of this deed of trust, by the party of the second part, or his successor in trust aforesaid in advertising and making such sale and conveyance to the extent of the recitals contained in such deed or deeds.

In witness whereof the said party of the first part have
60 hereunto set their hands and seals the day and year above written.

"SOLOMON SNOW. [SEAL.]
"ELIZABETH L. SNOW. [SEAL.]"

STATE OF ILLINOIS, } ss:
County of Cook, }

I, George W. Bishop, a notary public in and for the said county, in the State aforesaid, do hereby certify that Solomon Snow and Elizabeth L. Snow, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead. Given under my hand and notarial seal this thirty-first day of July, A. D. 1875.

[SEAL.] GEO. W. BISHOP,
Notary Public.

(Endorsed.)

STATE OF ILLINOIS, } ss: No. 41,939.
County of Cook, }

This instrument was filed for record in the Recorder's office of Cook county aforesaid on the 31st day of July, A. D. 1875, at 3 o'clock p. m., and recorded in Book 603 of Records, on page 94.

JAS. STEWART,
Recorder.

61 In the Circuit Court of the United States, for the Northern District of Illinois.

ANNIE E. HAYDEN, Complainant, }
vs. } In Chancery.
SOLOMAN SNOW *et al.*, Defendants. }

Testimony taken before Henry W. Bishop, master in chancery of said court, Tuesday, the 28th day of January, A. D. 1879.

Present: J. V. LeMoyne, (represented by Mr. Bacon,) solicitor for complainant, and Smith & Burgitt, defen'ant's solicitor. Willian C. Snow, a witness on behalf of the complainant, being first duly sworn, was examined-in-chief by Mr. Bacon, and deposes and says as follows:

Interrogatory 1. Please state your name?

Answer. William C. Snow.

(Counsel for complainant offers in evidence deed of trust from Solomon Snow and Elizabeth L. Snow, his wife, to Roswell B. Bacon, dated July 28, 1875, and recorded in the recorder's office of Cook county, State of Illinois, in book 603 of Records, page 94.)

Also two notes dated Chicago, July 28, 1875, each for the sum of

six thousand dollars made by Solomon Snow, payable to the order of himself at the Commercial National Bank of Chicago,
62 with interest from October 29, 1875, at the rate of eight per cent. per annum, payable semi-annually, and with interest at the rate of ten per cent. after maturity, one of said notes being payable two years from its date, and the other three years.

Endorsements on the back of them, "Pay to the order of J. E. Lockwood, Solomon Snow." "J. E. Lockwood."

(Counsel for defendant objects to the deed, for that the execution thereof by Solomon Snow and Elizabeth L. Snow, his wife, has not been duly proven; also objects to the notes for that it has not been proven that they were executed by Solomon Snow.)

Q. (Showing witness deed of trust offered in evidence.) Do you know the signatures thereto; if so, whose are they?

A. Yes, sir; I know the signatures to be those of Solomon Snow and Elizabeth L. Snow.

Q. Also look at the notes just offered in evidence, and state if you know the signature of the maker thereto?

A. Yes, sir.

Q. State whose it is?

A. It is Solomon Snow's signature.

Q. You may state what relation, if any, Solomon Snow and Elizabeth L. Snow were to you.

A. Solomon Snow was my father and Elizabeth L. Snow was my mother.

Complainant having served notice upon defendants to produce certain deeds, the notice is offered in evidence as Exhibit A.

Complainant also offered in evidence certified copy of deed
63 dated December 14, 1875, from Solomon Snow and Elizabeth L. Snow to William C. Snow, marked Ex. B.

Objected to for that it does not appear that it is the best evidence obtainable, or that the original deed is incapable of production by the complainant.

Complainant also offered in evidence certified copy of deed from William C. Snow to Isaac M. Daggett, dated January 28, 1876, marked Ex. C.

Objected to for that it does not appear that it is the best evidence of said deed obtainable, or that the original thereof has been lost or destroyed, and is not within the power of the complainant to produce here.

Counsel for complainant also offers in evidence deed, dated April 12, 1876, from Isaac M. Daggett and Sarah E. Daggett, his wife, to William Drury, marked Ex. D.

64 Q. Look at the paper now shown you, purporting to be a certified copy of a deed from William C. Snow to Isaac M. Daggett, and designated herein as Exhibit "C," and state if you were at any time the owner of the property therein described?

A. I was at this time, the 28th of January; I supposed I was.

Q. State if you made a conveyance of such property to the grantor therein named, Isaac M. Daggett.

Mr. BURGATT:

The question is objected to on the ground that if such convyance was made, it is capable of proof by the production of such deed of conveyance.

A. I did.

Mr. BACON:

Q. State what was the consideration in said deed?

A. $85,000.00 was the consideration in said deed.

Counsel for complainant objects to the testimony as stating the contents of a written instrument.

Q. You have stated that the consideration was $85,000.00, now state, if you please, how that consideration was made up, or of what it was composed?

A. It was composed of the two trust deeds, $28,000 one, and $12,000 the other.

Q. Making a total of how much?

A. Making $40,000, and the balance of the consideration was some bonds.

Q. You say part of it was made up of two trust deeds, one of $28,000, and the other of $12,000?

A. Yes, sir.

65 Q. Do you mean by that, that these trust deeds represented circumstances then existing upon that property?

Objected to as leading.

A. Yes, sir.

Q. In making up the amount of said consideration, did the said two encumbrances—one of $28,000 and one of $12,000—make up and form a part of the consideration?

(Objected to as leading.)

A. They did.

Q. For the making and giving of said deed?

(Objected to as leading.)

A. They did.

Q. Who conveyed this property to you?

(Counsel for the defendant objected to the question on the ground that it called for parol evidence of a written instrument, and evidence which is capable of proof by a written instrument.)

A. Solomon and Elizabeth L. Snow.

Q. State if you know where those original deeds are?

A. I do not.

Q. Do you know whether or not the one of Solomon Snow and Elizabeth L. Snow was delivered to Daggett or not?

A. I think it was, but I could not say positively; but I think it was left in his office.

Q. To whom did you deliver the deed of yourself to Isaac M. Daggett?

A. I delivered it to Isaac M. Daggett?

Q. Have you ever seen them since they were supposed to have been delivered to Mr. Daggett?

A. I never have.

66 Cross-examination by Mr. BURGETT:

Question. Your name is William C. Snow?

Answer. Yes, sir.

Q. You are a son of Solomon Snow and Elizabeth L. Snow, whose names have been mentioned here?

A. Yes, sir.

Q. You received, as grantee, from the said Solomon Snow and Elizabeth L. Snow a deed of conveyance to the east half of lot 2, in block 33, in the original town of Chicago, in the county of Cook, in the State of Illinois?

A. Yes, sir.

Q. That was a deed, a certified copy of which has been offered in evidence here?

A. Yes, sir.

Q. What was the consideration of that deed?

A. $80,000.

Q. $80,000 cash?

A. No.

Q. What was that $80,000 made up of?

A. It was made up of the encumbrances—$40,000 encumbrances—and the balance was other property. There was no cash at all, unless you count the encumbrances as cash.

Q. In consideration of this conveyance to you by Solomon Snow and Elizabeth L. Snow, you agreed to assume and pay off the two trust deeds on that property?

A. Yes, sir.

Q. Including the encumbrances thereon?

A. Yes, sir.

67 Q. And also conveyed to them their property?

A. Yes, sir.

Q. By that agreement you became personally liable for the payment of these encumbrances—trust deeds?

A. I suppose so.

Q. Mr. Snow, do you know whether the deed running from Solomon Snow and Elizabeth L. Snow, his wife, to yourself, was ever actually delivered into the possession of Isaac M. Daggett?

A. I don't know positively; I think it was, but I could not say positively.

Q. That is your impression?

A. Yes, sir.

Q. But you don't know; you wouldn't say positively, would you?

A. I wouldn't swear positively; no, sir; according to the best of my recollection he had it at the time I made the deed, and I never have seen it since.

Q. You never have seen it since?

A. No, sir.

Q. But you would not swear it passed into his possession at that time?

A. No, sir.

Q. Do you say you made a conveyance of these premises to Isaac M. Daggett?

A. Yes, sir.

Q. And that this certified copy, introduced in evidence here, is a copy of that conveyance?

A. It is as near as I can remember it; I could not swear it is a correct copy; it is like it as near as I can recollect.

Q. What do you say the consideration was for that deed?

A. $85,000.

Q. How was that consideration made up?

68 A. It was made of two encumbrances, $40,000, and the balance of it was in bonds.

Q. What kind of bonds?

A. I do not recollect; I believe they were some railroad bonds, but I don't remember what road they were.

Q. You don't know what railroad they were?

A. No, sir.

Q. How long ago was this?

A. This deed, I believe, gives the date, January, 1876.

Q. How many of these bonds were there?

A. I could not state positively as to that either; they were $1,000 bonds, and I think there were 52 of them; I think that was the number, I wouldn't say positive as to that.

Q. You think there were 52 $1,000 bonds, upon that and past due interest?

A. Yes, sir, I think so; that is my impression.

Q. You say a part of that consideration was made up of the aggregate of these encumbrances.

A. Yes, sir.

Q. If that was so why was it not stated in the deed?

A. Well, I don't think it is customary to state it in the deed; I don't know; I have never seen it stated.

Q. Isn't it stated in the deed taken by you from Solomon Snow and Elizabeth L. Snow?

A. No; that the encumbrance formed a part of the consideration?

Q. Yes.

A. No, sir; I don't think it was.

Q. This deed running from yourself to Isaac M. Daggett, a copy of which has been introduced in evidence—a purported copy that does not state that Isaac M. Daggett, in consideration of that
69 conveyance agreed, among other things, to pay off these trust deeds; does it those encumbrances?

A. I don't know that it does.

Q. If that had been the understanding of the parties it would have been so expressed in the deed, would'nt it?

A. I don't know; it might and it might not.

Q. You are liable at the present time for the payment of those trust deeds, aren't you?

A. I guess not.

C. Why not?

A. I went into bankruptcy.

Q. Have you got your discharge in bankruptcy?

A. No, sir.

Q. When was your petition filed in bankruptcy?

A. Seven or 8 months ago.

Q. Have you made any application for your discharge yet?

A. No.

Q. Then you are liable, aren't you?

A. I don't know whether I am or not, I am sure.

Q. Otherwise you have not received any discharge from the payment of these notes?

A. No, sir.

Q. These encumbrances, trust deeds?

A. No, sir.

Q. Have they ever been paid?

A. No, sir.

Q. Have you ever paid either one of them?

A. No, sir.

Q. Where were you when you made this conveyance to Isaac M. Daggett?

A. It was closed in his office.

70 Q. Where was his office?

A. It was right across here, in the Bryan Block; in the basement; I don't remember the number.

Q. What kind of an office did he have there?

A. I could not tell you.

Q. What kind of business was he carrying on there?

A. I don't know that he was carrying on any, and I don't know but he was.

Q. What do you mean by saying it was "closed," then?

A. That is when the papers were exchanged, when he gave me the bonds.

Q. There was a delivery of the deed at the time?

A. Yes, sir.

Q. Did he pay you any money at the time?

A. Yes.
Q. How much?
A. I borrowed some money of him at that time.
Q. You borrowed some money?
A. Yes.
Q. Did he pay you any money as part of the consideration of that conveyance?
A. No, sir.
Q. About how much money did you get of him at that time?
A. $4,000.
Q. Who went into the office with you; did you go alone?
A. I think so; I could not say; I don't remember whether I went in there alone; there were agents on both sides that have been negotiating the trade; I don't remember whether any of them went in with me or not; I guess there was some of them in there at that time; I don't remember whether they went in with me or not.

71 Q. There were more agents in there at the time of the delivery of this deed?

A. Yes, sir, I think so; I am not certain there was.
Q. Can you tell what other persons besides yourself and Isaac M. Daggett were in there?
A. I think that Whipple was in there; I am not sure that Pratt, a gentleman by the name of Pratt—I rather think he was in there, too.
Q. Rodney M. Whipple?
A. Yes, sir.
Q. What Pratt was that?
A. I don't know what his given name is.
Q. What was his business?
A. He was in the real estate business.
Q. Had he anything to do in negotiating this sale?
A. Yes, sir.
Q. Which party did he represent?
A. Daggett.
Q. Did you have any real estate agent along with you that had been negotiating the sale on your part?
A. No.
Q. Do you think there were any other persons in that office at that time besides yourself, Daggett, Whipple, and Pratt?
A. Oh, yes; there were quite a number there; it was a large basement, and there were several offices in there; I don't recollect who they were.
Q. Can you tell me whereabouts in the office Daggett's desk was, or his seat?
A. I believe it was the very front desk; I think it was.
Q. Near the front window?
A. Yes, sir.

72 Q. Was he alone or talking with any one when you first went in?

A. I don't recollect.

Q. Who first accosted the other?

A. I don't know.

Q. Can you tell us substantially the conversation that took place then between you and Mr. Daggett?

A. Well, I don't know that I can. In the first place, he gave me a portion of this money which I was borrowing of him, and I went and paid some interest that was due on the encumbrance, and then I came back. I left the deed there the first time, I am certain I did, and came back and got the balance of my money and the bonds.

Q. You first interest; on which one of the encumbrances?

A. On the $28,000 encumbrance.

Q. The larger of the ten trust deeds mentioned?

A. Yes, sir.

Q. You went in, left the deed you say, and got part of this money you were borrowing?

A. Yes, sir.

Q. Went away and then came back and got the bonds?

A. Yes, sir.

Q. Can't you tell us some of the conversation that took place when you went in first, or when you returned?

A. No, I could not. There is only one thing in addition to it that I recollect; I remember of Mr. Daggett speaking several times that day, and the other times about the trade, and calling this encumbrance that he was assuming, calling that $40,000 in cash; that is the way that it was understood, that he was paying $40,000 in cash and these bonds for the property.

Q. The estimated value of the property was $85,000?

A. Yes, sir.

73 Q. He paid you in bonds the estimated excess in value of the property over and above the amount of existing encumbrances?

A. Yes, sir.

Q. That is the way you arrived at how much money he should pay you in bonds actually passed over to you for the property?

A. Well, our value on the property was $85,000.00, all the time in talking of the trade; we called that property worth $85,000.

Q. And that is the way you arrived at the amount of bonds he should pay you—was to deduct the amount of the encumbrance from the estimated value of the property, $85,000?

A. Well, he didn't give just that amount, I think; I think we had a few more bonds at the face value than the difference; it is my impression that we had $52,000 of bonds, and the difference would only be $45,000.

Q. That you had more than the face value of the bonds?

A. Yes, sir.

Q. That is, the bonds did not go into the trade at par?

A. No.

Q. How long were you in there after taking in the deed before you got the money and went away to pay some of this interest?

A. Well, I don't know, I am sure; not but a few minutes though.

Q. How long were you there after you returned?

A. Well, it was a very short time.

Q. When had been the last time you had seen Daggett before you went in there at that time?

74 A. I could not say; it might have been one day; it might have been three or four; I don't know about that.

Q. You can't relate in substance the conversation that took place then?

A. I cannot.

Q. Where are you living now, Mr. Snow?

A. The Gardner House.

Q. Here, in Chicago?

A. Yes, sir.

Q. Where are Solomon Snow and Elizabeth L. Snow?

A. They are living at No. 427 Carroll avenue.

Q. In Chicago?

A. Yes.

Q. How long had this trade with Daggett for this property been negotiating?

A. Well, some time; I don't know; I should think perhaps a month; I don't know, but longer than that; it was quite a while.

Q. Did Daggett ever tell you expressly that he would pay off these trust deeds in so many words?

A. No; I think not.

Q. He spoke that he would pay them?

A. He spoke of his counting that so much cash; he had got to pay that $40,000; I don't know that he made any promise to pay it.

Q. If this encumbrance was on this particular piece of property that he bought, he would take it, subject to that encumbrance, wouldn't he; and if he ever got anything out of the property he would have to take care of the encumbrance, wouldn't he?

A. I suppose he would; yes.

Q. How many times do you think you saw Mr. Daggett about the conveyance of this property?

A. I should not think I saw him more than 3 times.

75 Q. Not more than three times that you yourself came in personal contact with him?

A. I think not more than that.

Q. Were all three of these meetings in Mr. Daggett's office that you have spoken of?

A. Well, I don't recollect of three meetings; I don't remember of but two, but still I don't know but there were more; these were both in his office.

Q. Those were both in the same office?

A. No; one was in Whipple's office, on Washington street.
Q. Whereabouts on Washington street?
A. I don't remember what the number was.
Q. Between what streets?
A. Between La Salle and 5th avenue, I think.
Q. North or the south side of the street?
A. On the south side of the street, I think.
Q. In Rodney M. Whipple's office?
A. No; it was on La Salle street; it was on the west side of La Salle street, between Madison and Washington; he was on Washington street a year or so ago, when I was in there, that is since that transaction; at that time he was on La Salle street.
Q. When were the terms of the sale from yourself to Issac M. Daggett finally arranged?
A. Well, it must have been a short time before this time that I mention when I turned the papers over to him; I think it was a day before that, perhaps; I don't know but it was the same day.
Q. They hadn't been finally agreed upon fully and entirely until the last meeting?
A. The last day, I think it was that day or the day before that some of those agents notified me, either Whipple or Pratt,
76 that he would give me what I asked.
Q. That he would take up your proposition or offer?
A. Yes; I don't know but it was the same day that the papers were passed; it was very shortly before at all events.
Q. Did you see Whipple the day before this day that you have spoken of meeting him at his office, when you delivered the deed; did you see him the day before?
A. I think I did; I am under the impression it was about the time he told me that Daggett had accepted my proposition.
Q. That was Whipple?
A. I think so.
Q. That is your impression?
A. I think so.
Q. You could not say positively now that it was he?
A. I cannot.
Q. Did you see Daggett that day, the day before the delivery of the deed?
A. I don't think I did, no, sir; I don't think I had seen Daggett for several days at the time the trade was completed.

WILLIAM C. SNOW.

Subscribed and sworn to before me this 18th February, 1879.

H. W. BISHOP,
Master in Chancey of the Circuit Court of the United States for the Northern District of Illinois.

77 U. S. Circuit Court, Northern District of Illinois. In Chancery.

ANNIE E. HAYDEN *vs.* SOLOMON SNOW *et al.*

To A. S. Bradley & H. H. Thomas and Smith & Burgett, solicitors and of counsel:

Please take notice that on Tuesday, Jan'y 28th, A. D. 1879, at 11 o'clock a. m. of said day, I shall proceed to offer my proof on the part of the complainant in the above-entitled cause before and at the office of H. W. Bishop, master in chancery, to whom said cause has been heretofore referred.

J. V. LE MOYNE,
Compl't's Sol'or.

Service of copy of above notice, this day of Jan'y, 1879, admitted.
SMITH & BURGETT,
Sol'r for Wm. Drury.

78 UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Roswell B. Bacon, being duly sworn, stated that he served the within notice upon Messrs. A. S. Bradley and H. H. Thomas, by leaving a true copy thereof at the office of said Bradley & Thomas, on the 25th day of January, A. D. 1879.

ROSWELL B. BACON.

Subscribed and sworn to before me, this 28th day of Jan'y, 1879.
[SEAL.] HENRY B. BERGEN,
Notary Public.

79 STATE OF ILLINOIS, }
County of Cook, } *ss:*

I, James W. Brockway, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the 31st day of January, A. D. 1876, as document No. 69,857, and recorded in book 610 of records, at page 73.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Chicago, this fourteenth (14) day of January, A. D. 1879.

[SEAL.] JAS. W. BROCKWAY,
Recorder.

80 EXHIBIT C.

Deed from William C. Snow to Isaac M. Daggett.

This indenture, made this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and seventy-six, between William C. Snow (bachelor), of the city of Chicago, in the county of Cook, and State of Illinois, party of the first part and

Isaac M. Daggett, of the city of Chicago, in the county of Cook, and State of Illinois, party of the second part.

Witnesseth: That the said party of the first part, for and in consideration of the sum of eighty-five thousand ($85,000) dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, ha— granted, bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents does grant, bargain, sell, remise, convey, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all the following described lot, piece, or parcel of land, situated in the county of Cook, and State of Illinois, and known and described as follows, to wit:

The east half of lot two (2), in block thirty-three (33), in the original town of Chicago, subject to a certain trust deed executed by Solomon Snow and Elizabeth L. Snow, his wife, to E. C. Larned, trustee, to secure payment of $28,000, executed July 28th, 1875, due five years from date, with interest at 10 per cent. per annum, payable semi-annually, subject also to another trust deed executed by said Solomon Snow and wife to R. B. Bacon, trustee, to secure payment of $12,000, dated July 28th, 1875, due 2 and 3
81 years from date, with interest at 8 per cent. per annum, payable semi-annually, interest to commence Oct. 31st, 1875.

Together with all and singular, the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim or demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances. To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

And the said William C. Snow, party of the first, for himself, his heirs, executors, and administrators, does covenant, grant, bargain, and agree to, and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, he is well seized of the premises above conveyed, as of a good sure, perfect, absolute and indefeasible estate of inheritance in law, in fee simple, and has good right, full power and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and encumbrances, of what kind or nature soever, except as above recited, and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every other person or persons lawfully claim-
82 ing or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend, except as against above mentioned trust deed.

And the said party of the first part hereby expressly waives and releases any and all right, benefit, privilege, advantage, and exemption, under or by virtue of any and all statutes of the State of Illinois, providing for the exemption of homesteads from sale or execution or otherwise.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

WILLIAM C. SNOW. [SEAL.]

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Daniel N. Bash, a notary public in and for the said county, in the State aforesaid, do hereby certify that William C. Snow (bachelor), personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument as his free and voluntary act, for the use and purpose therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal, this thirty-first day of January, A. D. 1876.

[NOTARIAL SEAL.] DANIEL N. BASH,
Notary Public.

No. 69,857. Filed for record this 31st day of Jan'y, A. D., 1876, at 2 o'clock — M.

JAMES STEWART, *Recorder.*

83 STATE OF ILLINOIS, } ss:
County of Cook, }

I, James W. Brockway, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument, filed in my office, the 22d day of April, A. D. 1876, as document number 82,116, and recorded in Book 648 of Records, at page 463.

In testimony whereof I have hereunto set my hand and affixed my official seal at Chicago, this fourteenth (14) day of January, A. D. 1879.

[SEAL.] JAMES W. BROCKWAY,
Recorder.

84 *Deed from Daggett to Drury.*

This indenture, made this twelfth (12th) day of April, in the year of our Lord one thousand eight hundred and seventy-six, between Isaac M. Daggett and Sarah E. Daggett, his wife, of the city of Chicago, in the county of Cook, and State of Illinois, party of the first part, and William Drury, of New Boston, in the county of Mercer, and State of Illinois, party of the second part.

Witnesseth, that the said party of the first part for and in consideration of the sum of seventy-five thousand (75,000) dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, have granted, bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, convey, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all the following-described lot, piece, or parcel of land situated in the county of Cook, and State of Illinois, and known and described as follows, to wit:

The east half of lot two (2), in block thirty-three, (33), in the original town of Chicago, subject to a certain trust deed executed by Solomon Snow and Elizabeth L., his wife, to E. C. Larned, trustee, to secure payment of twenty-eight thousand dollars, ($28,000), executed July 28th, 1875, due five years from date, with interest at ten per cent. per annum, payable semi-annually. Also subject to another trust deed executed by said Solomon Snow and wife to R. B. Ba-
85 con to secure the payment of twelve thousand dollars, ($12,000), dated July 28th, 1875, due two and three years from date, with interest at eight per cent. per annum, payable semi-annually.

Both of which said incumbrances the party of the second part herein assumes and agrees to pay.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part either in law or equity of, in, and to the above bargained premises, with the hereditaments and appurtenances.

To have and to hold the said premises above bargained and described with the appurtenances unto the said party of the second part, his heirs, and assigns forever. And the said Isaac M. Daggett, party of the first part, for himself, and his heirs, executors, and administrators does covenant, grant, bargain, and agree to and with the said party of the second part, his heirs, and assigns, that at the time of the ensealing and delivery of these presents, he is well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances of what kind or nature soever, and the above bargained premises in the quiet and peaceful possession of the said party of the second part, his heirs and
86 assigns, against all and every other person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

And the said party of the first part hereby expressly waive and release any and all right, benefit, privilege, advantage, and exception under or by virtue of any and all statutes of the State of Illinois, providing for the exemption of homesteads from sale or execution or otherwise.

In witness whereof the said party of the first part have hereunto set their hands and seals the day and year first above written.

ISAAC M. DAGGETT, [SEAL.]
SARAH E. DAGGETT. [SEAL.]

Signed, sealed, and delivered in the presence of—

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Silas S. Willard, a notary public in and for the said county, in the State aforesaid, do hereby certify that Isaac M. Daggett and Sarah E. Daggett, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead. Given under my hand and notarial seal, this twelfth (12th) day of April, A. D. 1876.

[NOTARIAL SEAL.] SILAS S. WILLARD,
Notary Public.

No. 82,116. Filed for record this 22d day of April, A. D. 1876, at 10 a. m. James Stewart, recorder.

87 STATE OF ILLINOIS, } ss:
County of Cook, }

I, James W. Brockway, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the 31st day of January, A. D. 1876, as document No. 69,856, and recorded in book 648 of records, at page 52.

In testimony whereof I have hereunto set my hand and affixed my official seal at Chicago, this fourteenth (14) day of January, A. D. 1879.

[SEAL.] JAMES W. BROCKWAY,
Recorder.

EXHIBIT "B."

Deed from Solomon Snow to William C. Snow.

This indenture, made this fourteenth day of December, in the year of our Lord one thousand eight hundred and seventy-five, between Solomon Snow and Elisabeth L. Snow, his wife, of the city of Chicago, in the county of Cook, and State of Illinois, party of the first part, and William C. Snow, of the city of Chicago, in

the county of Cook, and State of Illinois, party of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the sum of eighty thousand ($80,000.00) dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part, forever released and discharged therefrom, have granted,
88 bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, convey, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever all the following described lot, piece, or parcel of land situated in the county of Cook and State of Illinois, and known and described as follows, to wit: The east half of lot two (2), in block thirty-three (33), in the original town of Chicago, subject to a certain trust deed executed by Solomon Snow and Elizabeth L. Snow, his wife, to E. C. Larned, trustee, to secure payment of $28,000.00, executed July 28th, 1875, due five years from date with interest at 10 per cent. per annum, payable semi-annually, subject also to another trust deed, executed by said Solomon Snow and wife, to R. B. Bacon to secure payment of $12,000.00, dated July 28th, due 2 and 3 years from date with interest at 8 per cent. per annum, payable semi-annually, subject also to all accrued interest on both before-named trust deeds.

The party of the second part hereby assumes and agrees to pay above-mentioned trust deeds and accrued interest thereon, and save the party of the first part harmless therefrom.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances; to have and hold the said prem-
89 ises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs, and assigns forever.

And the said Solomon Snow and Elizabeth L. Snow, his wife, party of the first part, for themselves, their heirs, executors, and administrators, do covenant, grant, bargain, and agree to, and with the said party of the second part, his heirs, and assigns, that at the time of the ensealing and deliv'y of these presents they are all seized of the premises above conveyed, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in law in fee simple, and have good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid; and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and encumbrances of what kind or nature soever.

And the above-bargained premises in the quiet and peaceable possession of the said party of second part, his heirs and assigns,

against all and every other person or persons lawfully claiming or to claim the whole, or any part thereof, the said party of the first part shall and will warrant and forever defend, except as against above-mentioned trust deeds, and accrued interest thereon.

And the said party of the first part hereby expressly waive and release any and all right, benefit, privilege, advantage, and exemption, under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale, or execution, or otherwise.

In witness whereof, the said party of the first part have
90 hereunto set their hands and seals, the day and year first above written.

SOLOMON SNOW, [SEAL.]
ELIZABETH L. SNOW, [SEAL.]

STATE OF ILLINOIS, } ss:
County of Cook, }

I, George W. Bishop, a notary public in and for the said county, in the State aforesaid, do hereby certify that Solomon Snow, and Elizabeth L. Snow, his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal, this fourteenth day of December, A. D. 1875.

[NOTARIAL SEAL.] GEO. W. BISHOP,
Notary Public.

No. 69,856. Filed for record this 31st day of January, A. D. 1876, at 2 o'clock P. M.

JAMES STEWART, *Recorder.*

91 EXHIBIT "A."

U. S. Cir. Court Northern Dis't of Ills.

ANNIE E. HAYDEN
vs. } In Chancery.
SOLOMON SNOW *et al.*

To A. S. Bradly, H. H. Thomas, sol'c'rs, and Smith & Burgett, of counsel.

You are hereby notified to produce before H. W. Bishop, Master in ch'y, Jan'y 28th, 1879, at eleven o'clock A. M. of said day, upon the taking of evidence in above cause, the following deeds, to wit: Warranty deed, from Solomon Snow and wife to Wm. C. Snow, dated Dec. 14th, 1875, and recorded in recorder's office of Cook county, in book 648 of records, page 52; also, warranty deed, from Wm. C. Snow to Isaac M. Daggett, dated Jan'y 28th, 1876, and

recorded in the recorder's office of Cook county, in book 610 of records, page 73, and, also, warranty deed, from Isaac M. Daggett and wife to Wm. Drury, dated April 12th, 1876, and recorded in the recorder's office of Cook county, in book 648 of records, page 463.

J. V. LEMOYNE, *Compl't's Sol'c'r.*

Service of copy admitted this 27th day of Jan'y, 1879.

SMITH & BURGETT,
Sol'c'rs for Drury.

92 In the Circuit Court of the United States for the Northern District of Illinois.

ANNE E. HAYDEN, Complainant,
vs.
SOLOMON SNOW *et al.*, Defendants. } In Chancery.

Testimony taken before Hen'y W. Bishop, master in chancery of said court, Friday, the 18th day of July, A. D. 1879.

Present R B. Bacon, Esq., solicitor for complainant, and John M. H. Burgett, Esq., solicitor for defendant.

William Drury, a witness on behalf of the defendants, being first duly sworn, was examined in chief by Mr. Burgett, and deposes and says, as follows:

Interrogatory 1. Please state your name.

Answer. William Drury.

Q. Where do you live?

A. Mercer county, Illinois.

Q. Are you one of the defendants to this suit?

A. I am.

Q. Mr. Drury, look at this deed marked Exhibit "A" to the deposition of Isaac M. Daggett in this case; are you the William Drury mentioned in there as being of New Boston, Mercer county, Illinois?

A. Yes, sir.

Q. Do you know the property described in that deed?

A. Yes, sir.

Q. Where is that property situated?

93 A. On Lake street in this city.

Q. In the city of Chicago, State of Illinois?

A. Yes, sir.

Q. The property is called the Minnesota Block?

A. Yes, sir; I know it by that name; I would not know it by this description; but I know this is the deed, and I know that is the property.

Q. The Minnesota Block, on Lake street?

A. Yes, sir.

Q. Do you own or did you ever own that property?

A. Yes, sir.

Q. From whom did you acquire the title?

A. From Isaac M. Daggett.

Q. Is that the deed of conveyance by which the title was transferred to you?

A. Yes, sir; this is the deed conveying it to me.

Q. It was conveyed to you at the time the deed bears date?

A. Yes, sir; it was traded for perhaps about a month before the deed was made and agreed upon.

Q. How long have you known Mr. Daggett?

A. I never knew him until about a month before this deed was made; I never saw him before.

Q. You have known him ever since?

A. Yes, sir.

Q. Do you know Rodney M. Whipple?

A. Yes, sir; I became acquainted with him about the same time that I did with Mr. Daggett.

Q. State what the consideration was, Mr. Drury, of the conveyance of that property to you by Isaac M. Daggett.

(Objected to by solicitor for complainant on the ground that the deed is the best evidence.)

94 A. The consideration was a farm of 800 acres of land in Mercer county, where I then lived, a stock of household goods, and other property. The bargain was, that I was to give that property for four pieces of property in Chicago; this is one of them, there are three other pieces of property.

Q. What other pieces of property; where are they located?

A. One was called the Jenks Block, on Madison street, and one piece of property on Aberdeen street, and known as the Holden Block, I believe.

Q. Residences?

A. Residence houses, and the fourth one was on the river—a packing house and lot, a store building.

Q. Was the Helfer property included in that?

A. No; that was a subsequent trade, it had nothing to do with the original trade.

Q. These several pieces of property were conveyed to you in consideration of your conveyance of your farm that you have named?

(Objected to by solicitor for complainant as incompetent, and as contradicting a written instrument.)

A. Yes, sir; the bargain was, I was to give that property for the equity in these four pieces of property, including this one.

Q. The equity of redemption?

A. Yes, sir.

Q. Were all of these several pieces of property encumbered?

(Objected to by solicitor for complainant as incompetent, and as contradicting a written instrument.)

A. They were all encumbered.

Q. Mr. Drury you may state whether there was any cash
95 paid as any part of the consideration of the conveyance of this property to you?

A. Not a dollar.

Q. And these other pieces?

A. Not a dollar on either side; it was a swap or exchange; I agreed to give my property then, for this property, subject to these encumbrances. The consideration in the deed was what they claimed the property was worth; they put it in themselves; I supposed it made no difference.

(Solicitor for complainant objected to the answer, as far as it contradicts a written instrument.)

Q. You may state, Mr. Drury, whether on any consideration you ever at any time assumed or agreed to pay off any encumbrance in any form whatever, existing on the property described in this deed.

(Exhibit D, to deposition of William C. Snow, and Exhibit "A," to deposition of Daggett.)

(Solicitor for complainant objected to the question as being leading, incompetent, and contradictory of a written instrument.)

A. I did not; it was distinctly understood that I was not to assume any encumbrances.

Q. Understood between whom?

A. Between the parties, between Mr. Daggett and myself.

Q. The parties to this conveyance?

A. Yes; at the time we traded it was mentioned and spoken of repeatedly, that I would not be accountable for the encumbrances; that was our bargain and agreement at the time we made the trade.

Q. You may state, Mr. Drury, when you first saw this deed?
96 A. I first saw this deed a short time after it was made; the deeds were executed here in Chicago and brought down to me.

Q. In Mercer county, Illinois?

A. To my home in Mercer county, Illinois, and I read them and failed to see this clause; I did not discover it.

Q. Which clause?

A. The clause making me agree to pay the encumbrances; there are four deeds, and the other three had not this clause in; this one I learned afterwards had; I failed to see it at the time; I thought I had read them carefully, but it seems I did not see it; I should not have accepted it if I had.

Q. You may state, Mr. Drury, when you first became aware of the presence of the clause of assumption contained in that deed (Exhibit D to the testimony of William C. Snow) of encumbrances existing on the property described in it.

(Solicitor for complainant objected to the question as incompetent and immaterial.)

A. It was sometime in the spring of 1877; I don't recollect the time exactly; probably in April.

Q. You may state who, if any one, first called your attention to the presence of that clause in that deed (Exhibit D)?

A. Mr. Larned.

Q. Mr. E. C. Larned?

A. E. C. Larned. There were two Mr. Larneds present.

Q. Father and son?

A. Yes. One of them told me in talking about this mat-
97 ter—I was trying to get a reduction of interest—he told me I had assumed—there was an assumption clause in the deed; I said, no, there was no such clause in it—I knew it; I had read the deed, and it was not the agreement; the agreement was there showed to none, and I was sure there was none. He said I was mistaken, and got a copy or memorandum of some kind or another, and convinced me it was in. The deed was in Mr. Whipple's possession as agent, the man who was renting the property for me.

Q. State if at that time Mr. Larned was representing the larger of the two encumbrances mentioned in there.

A. Yes, sir; he was trustee, and was talking up the matter.

Q. And he held the notes?

A. Yes, sir.

Q. You were trying to get a reduction of interest on those notes, or extension of the time of the paper?

(Objected to as immaterial and incompetent.)

A. Yes, sir; I then went immediately to Mr. Daggett and Mr. Whipple's office, with F. P. Burgett, cashier of our bank.

(Answer objected to as not being responsive to any question.)

Q. State, Mr. Drury, what you did after becoming aware of the presence of that clause in that deed?

A. I went to Daggett and Whipple with F. P. Burgett, and we informed them I had discovered this clause in the deed, which was contrary to our agreement. They said it was certainly not in it; it
98 was not intended to be, and certainly was not in it; they seemed very much surprised, but when the deed was hunted up, and it was found to be a fact, Mr. Daggett said at once he would do any thing that was requisite to correct that error; it was a mistake of the man who drew the deed evidently; it was not the intention to make me liable.

(Solicitor for complainant objected to the answer.)

Q. Mr. Drury, look at this paper marked Exhibit B, attached to the deposition of Isaac M. Daggett, in this cause, dated the 12th day of July, 1877, and signed by Isaac M. Daggett, to which a cer-

tificate is attached signed by James L. High, notary public; state when you first saw that paper?

A. I saw it about the date on which it was recorded, entered for record, July 18th, 1877.

Q. State when you first saw it, Mr. Drury.

A. Either Mr. Daggett or Mr. Whipple gave it to me here in the city.

Q. In the city of Chicago?

A. Yes, and I took it; I knew pretty soon after I got it, and took it; that is the way I remember the date, I don't know the date only from the fact that when I got it of them, I took it either that day or the next to the office to be recorded.

Q. To the recorder's office of Cook county?

A. The recorder's office.

Q. You may look at the signature; the name of Isaac M. Daggett attached to that paper, and state if you know whether or not that is the genuine signature of Isaac M. Daggett.

A. I have no doubt of it.

Q. You know his signature?

100 A. I know it well.

Q. State whether or not at the time you have mentioned you went to see Isaac M. Daggett and Rodney M. Whipple, after becoming aware of the presence of that clause of assumption in the deed of conveyance from Isaac M. Daggett to yourself, James L. High, whose signature is attached to that Exhibit B, was present?

A. Mr. Daggett went and brought him in, or one of them went and brought him into their office.

Q. Mr. Drury, you may state, if you know in whose handwriting this paper marked Exhibit "B," is; who drew that paper?

(Objected to as immaterial.)

A. J. L. High; I was informed by himself and others, drew it.

Mr. BACON:

Q. Did you see him draw it?

A. I did not.

Mr. BURGETT:

Q. You may state, Mr. Drury, how long after you went to Mr. Daggett and Mr. Whipple, and had the conversation you have spoken of about the presence of the clause of assumption in the deed of conveyance from Isaac M. Daggett to yourself, that that paper marked Exhibit "B," came into your possession?

A. I should think about two months; I don't remember exactly.

Q. You may state for what purpose this paper marked Exhibit "B" was drawn and executed by Mr. Daggett.

(Objected to as incompetent, the writing itself being the best evidence.)

101 A. It was given to correct the error in the deed from Mr. Daggett to me, in which I was made to assume the payment of these encumbrances.

Q. Mentioned in that deed?

A. Mentioned in the deed.

Q. You may state, Mr. Drury, whether the clause of assumption of the encumbrances existing on that property heretofore spoken of and mentioned in this conveyance by Isaac M. Daggett to yourself as grantee, was inserted in that deed in accordance with or contrary to the agreement between yourself and Mr. Daggett, respecting the conveyance of the property mentioned in that deed by himself to you?

(Objected to as being incompetent and immaterial, and as contradicting a written instrument.)

A. The assumption clause was inserted contrary to our agreement, which was, that I should not assume the payment of any encumbrance distinctly and expressly agreed between all the parties, Mr. Daggett, Mr. Whipple, and myself.

Q. You may state, Mr. Drury, how long after you became aware of the presence of that clause in that deed before you went to Mr. Daggett to have the error or mistake through which it was inserted in that deed corrected?

A. I went immediately the same day; perhaps the same hour.

Q. Mr. Drury, you may state whether or not this property mentioned in this deed has been sold at foreclosure sale under either of the encumbrances mentioned in that deed, if you know.

(Objected to as immaterial and incompetent.)

A. I believe it has been sold; that is my understanding.

103 Q. Under which one of the trust deeds mentioned therein, Mr. Drury?

A. I haven't kept run of them enough to know whether under both or not; I do not really know; I understand it has been sold; suit has been brought in both cases, I believe.

Q. Mr. Drury, you may state whether or not, before this deed, marked Exhibit "A," to the deposition of Isaac M. Daggett, was executed by him, there was any conversation between you and him as to the form that should be given to the deed of conveyance, or how it should be drawn.

(Objected to as incompetent and as contradicting a written instrument.)

A. There was.

Q. State what such conversation was?

A. As I before stated, it was distinctly agreed between us that the deed should be drawn subject to these encumbrances, and I should not assume to pay them; that was distinctly and expressly agreed and talked of.

Q. Mr. Drury, you may state whether the encumbrances existing on the property mentioned and described in this deed, attached to the deposition of Isaac M. Daggett in this case, and marked Exhibit "A," formed any part of the consideration of the conveyance of that property by Mr. Daggett to you by that deed?

(Objected to as immaterial, incompetent, and contradicting a written instrument.)

A. They did not.

Cross-examination by Mr. BACON:

Q. Mr. Drury, do you know who drew this deed from
104 Isaac M. Daggett and wife to you?

A. I do not; I could not tell you.

Q. It was furnished to you by Mr. Daggett, was it?

A. Yes, sir.

Q. And accepted by you?

A. Yes, sir.

Q. Did you receive any other deeds at the same time from Mr. Daggett?

A. Yes, sir; they were all four handed to me at once.

Q. At the same time?

A. At the same time—all put up in a package together.

Q. Was this after or prior to the transfer by you of this farm of 800 acres, which you have mentioned, to Daggett?

A. The deeds were, I think, exchanged at the same time.

Q. Were the other three deeds from Daggett to you in the same handwriting?

A. Yes, sir; I believe they were all in the same handwriting; that is my recollection.

Q. And you state this deed is the only one that had the clause in it assuming the encumbrances, do you?

A. Yes, sir.

Q. Were there encumbrances upon the other pieces of property conveyed by the other three deeds?

A. There were; yes, sir.

Q. These deeds were all made out and delivered at the same time, were they?

A. They were.

Q. Were they prepared at your instance or request?

A. The agreement was when we traded, perhaps a month before the dates of these deeds, that we were to consummate the trade by exchanging deeds.

105 Q. Did you furnish a deed to Mr. Daggett for your farm?

A. Yes, sir, I furnished a deed.

Q. And Mr. Daggett furnished this (Exhibit "A" to deposition of Isaac M. Daggett) and three other deeds to you, did he?

A. Yes, sir.

Q. Do you know of your own knowledge in whose handwriting

the instrument designated as Exhibit "B" to Isaac M. Daggett's deposition, is?

A. I have seen some of Mr. High's writing; I think that is his writing; I did not see him write it; I understood he wrote it from him and from others. In the first place, I heard him say he never wrote it, and afterwards understood he did.

Q. But you have no knowledge of your own that it is his handwriting?

A. I didn't see him write it, and I don't know positively that he did; it looks like his handwriting; I have seen some of his handwriting several times; I am pretty sure it is his handwriting; I would not swear positively.

Q. You got this property known as the Minnesota Block on the 12th day of April, 1876, did you not?

A. Yes, sir; that is when the deeds are all dated, the four deeds.

Q. State if you have paid any interest upon those encumbrances designated in that deed?

A. I have paid some interest.

Q. To whom?

(Solicitor for defendants objected to the witness being interrogated in reference to matters not gone into on direct examination.)

106 Mr. BACON: I make it my own testimony then.

A. My agents here paid interest, I don't know how much; they have paid interest for awhile to the holder of the notes.

Q. Have you paid any interest upon the encumbrances designated therein, as being of the amount of twelve thousand dollars since you came into the possession of this property?

A. Yes, sir.

Q. Do you know many times.

A. I could not tell how much; I haven't done it myself personally; my agents have paid it.

(Mr. BURGETT: I object to all testimony relating to payment of interest by the witness on encumbrances mentioned in the deed of conveyance by Isaac M. Daggett to William Drury, for that there are no allegations in the bill of complaint in this cause, touching any such payments of interest.)

Mr. BACON:

Q. That assumption clause was in the deed when you received it; was it not, Mr. Drury?

A. I presume so; I didn't see it, but I presume it was in there.

Q. I will ask you, if at any time subsequent to April 12th, 1876, and prior to the commencement of this suit, Mr. Rodney M. Whipple, of Chicago, was authorized by you to settle or purchase or compromise the twelve thousand dollar encumbrance designated in the deed from Isaac M. Daggett and wife to you?

107 (Objected to as irrelevant and immaterial in this cause.)

A. Rodney M. Whipple told me he could buy it for a song, for a little or nothing, and all the authorization he ever had from me was, if he got anything that he thought was a good thing for me, in the way of purchasing the property, he might submit it to me for my consideration, that is all.

Mr. BURGETT:

Q. Purchasing the encumbrance?

A. Yes, sir; buying the twelve thousand mortgage. He said he could buy it for a song. It was not worth anything, perhaps, and he thought it might be worth something to me in making trades for property.

Mr. BACON:

Q. Was he ever authorized by you to give for said twelve thousand dollar encumbrance the sum of five thousand dollars in money?

A. No, sir.

Q. Was he ever authorized by you to give four or five thousand dollars in money, and some encumbered property besides?

A. No, sir; all there was in it, Mr. Whipple said he could trade some property here in town that would not cost him anything—or cost him but little—something of that sort, for that note, and turn it over to me, and he was figuring at it, as I learned from Mr. Snow, and himself with Mr. Lockwood came down to see me, to see what was in it, and I told him there was nothing in it; I never authorized him to do anything just before he went east and died.

Re-direct examination by Mr. BURGETT:

108 Q. Mr. Drury, you may state whether this deed marked Exhibit "A" to the deposition of Isaac M. Daggett, in this cause, was accepted by you with the knowledge that it contained a clause of assumption on your part of the encumbrances mentioned in it.

(Objected to as incompetent and material.)

A. It was not, with the knowledge that that clause was in the deed.

Q. You may state, Mr. Drury, what you meant by the word "accepted," used by you when you said on cross-examination that you accepted the deed.

A. I meant that I received them; I gave him my deed and received those, supposing they were agreeable to our contract, and according to our contract and bargain that we made?

Q. Mr. Drury, you may state to whom you paid interest on the twelve thousand dollar encumbrance mentioned in that deed (Exhibit "D".)

A. Mr. Lockwood was the man that held the encumbrance, I think.

Q. Joseph E. Lockwood?

A. I don't know what his name is.

Q. What time was that?

A. Different times along; pretty soon after I got the property; we kept the interest all paid up.

Q. What was the date of the last payment of interest?

A. I could not tell you; I don't know.

Mr. BACON:

Q. Personally, you did not pay it to anybody?

A. No.

WILLIAM DRURY.

Subscribed and sworn to before me:

H. W. BISHOP,
Master in Ch'y, &c.

109 In the Circuit Court of the United States for the Northern District of Illinois.

ANNIE E. HAYDEN, Complainant,
vs.
SOLOMON SNOW *et al.*, Defendants.
} In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Friday, the 18th day of July, A. D. 1879. Present: R. B. Bacon, Esq., solicitor for complainant, and J. M. H. Burgett, Esq., solicitor for defendants.

ROSWELL B. BACON, a witness on behalf of the defendants, being first duly sworn, was examined in chief by Mr. Burgett, and deposes and says as follows:

Int. 1. Please state your name.

Ans. Roswell B. Bacon is my name.

Q. Did you ever have in your possession the notes secured by this twelve thousand dollar encumbrance, mentioned in the deed from Isaac M. Daggett to William Drury?

A. I have.

Q. How long have those notes been in your possession?

A. They have been in my hands since the first of November, 1876, only a short time prior to the institution of this suit, being then placed in my hands by J. McGregor Adams, agent of complainant, and prior to that they were in my hands a short time when Mr. Lockwood was away.

Q. What was the date of the decease of Mr. Joseph E. Lockwood?

A. He died November 20th, 1878.

Q. Do you know the complainant in this case, Annie E. Hayden?

A. I do not, personally.

Q. Where does she live?

A. The place I could not give you any more than the
110 State of Massachusetts; but I do not know her personally.

Q. Did you ever have any correspondence with her.

A. No, sir.

Q. State if you know of whom she acquired the notes secured by this twelve thousand dollar encumbrance?

A. Joseph E. Lockwood.

Q. What date?

A. I shall have to look at the bill, but it is about November 1st, 1876.

ROSWELL B. BACON.

Subscribed and sworn to before me, this 18th day of July, 1879.

H. W. BISHOP,

Master in Chancery of the Circuit Court of the United States, for the Northern District of Illinois.

111 In the Circuit Court of the United States for the Northern District of Illinois.

ANNIE E. HAYDEN, Complaint,
vs.
SOLOMON SNOW, *et al.*, Defendants. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Friday the 18th day of July, A. D. 186[7]9. Present: R. B. Bacon, Esq., solicitor for complainant, and J. M. H. Burgett, Esq., solicitor for defendants. J. M. H. Burgett, a witness on behalf of the defendants being first duly sworn, deposes and says, as follows:

My name is John M. H. Burgett; I am attorney for William Drury, the defendant in this cause; have been for two years. Suits for the foreclosure of both the trust deeds mentioned in the conveyance from Isaac M. Daggett to William Drury, have been commenced in the circuit court of the United States for the northern district of Illinois. This suit is for the foreclosure of the twelve thousand dollar encumbrance mentioned in that deed. Decree was entered in the foreclosure case of the twenty-eight thousand dollar encumbrance, and the property was sold for the payment of that encumbrance on the twenty-sixth day of July, 1878.

And the complainant in the foreclosure case of the twenty-eight thousand dollar encumbrance bought in the property at the foreclosure sale and bid for the same the sum of thirty-one thousand dollars, leaving a deficit of $1,456 under the decree of foreclosure in that case.

112 It wanted that much of satisfying the decree.

JOHN M. H. BURGETT.

Subscribed and sworn to before me, this 18th July, 1879.

H. W. BISHOP,

Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

113 In the Circuit Court of the United States for the Northern District of Illinois.

ANNIE E. HAYDEN, Complainant,
vs.
SOLOMON SNOW, *et al.*, Defendants. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Friday, the 18th day of July, A. D. 1879. Present: R. B. Bacon, Esq., solicitor for complainant, and J. M. H. Burgett, Esq., solicitor for the defendant William Drury. Lorenzo Pratt, a witness on behalf of the defendants, being first duly sworn, was examined-in-chief by Mr. Burgett, and deposes and says, as follows:

Interrogatory 1. Please state your name, age, residence, and occupation?

Answer. My name is Lorenzo Pratt; I am of lawful age; my business is real estate; my office is 156 Washington street, Chicago.

Q. How long have you been in the real estate business, Mr. Pratt, here in Chicago?

A. I came here in 1872; I have been engaged in that ever since.

Q. Were you engaged in the real estate business before that time?

A. Yes, sir; more or less for many years, I suppose 15 years.

Q. Do you know Isaac M. Daggett?

A. I do.

Q. Do you know William C. Snow?

A. I do.

Q. Do you know Rodney M. Whipple?

A. I do.

114 Q. Mr. Pratt, here is a certified copy of a deed attached to the deposition of William C. Snow, in this case, the deed is dated the twenty-eighth day of January, 1876; the grantor is William C. Snow, and the grantee is Isaac M. Daggett; look at the description of the property in that deed and tell us whether you know that property described there?

A. I suppose that that has reference to what is known as the Minnesota Block; I do not know it by any other name.

Q. The Minnesota Block?

A. Yes, sir.

Q. Where is that block?

A. It is located on Lake street, a little west of La Salle street.

Q. Lake street in the city of Chicago?

A. Yes, sir.

Q. In the State of Illinois?

A. Yes, sir.

Q. Mr. Pratt, in the course of your business as a real estate broker, did you ever negotiate any trades or sales of the Minnesota Block, that property, (indicating the description in the deed above mentioned)?

A. Yes; I negotiated the sale from Mr. Snow to Mr. Daggett of that property, of the Minnesota Block.

Q. William C. Snow to Isaac M. Daggett?

A. Yes, sir.

Q. The parties mentioned in that deed?

A. Yes, sir.

Q. When was that sale made and those negotiations had?

A. Well, I have nothing to fix the date except these
115 papers, and I should think it was about that time; probably that is the precise date.

Q. About the date mentioned in that deed?

A. Yes, sir.

Q. Which one of the parties to that deed did you represent in the negotiations in the trade?

A. Well, I shall have to answer that by explaining a little, and and let you decide. Mr. Daggett wanted some properties here and I interested myself in finding them for him, and I found this. Mr. Snow had this property and I brought it to the notice of Mr. Daggett, and I did all the business that was done between them in the way of arranging the prices and trades; it was a sort of a trade.

Q. Was there any real estate broker representing Mr. Daggett in the trade or sale?

A. None, unless Mr. Whipple could be considered such.

Q. Rodney M. Whipple?

A. Yes, sir.

Q. Did he represent Mr. Daggett?

A. Yes; well I suppose at the time, without knowing positively about it, that they were sort of working together.

Q. That Daggett and Whipple were?

A. Yes, sir; I got that impression.

Q. Over what length of time did these negotiations extend?

A. For this property?

Q. Yes.

A. Well, it was some few weeks, I should say two or three weeks probably; I know there was a good deal of talk and some considerable delay about it.

Q. Do you knew where the deed was delivered of the property?

116 A. I think it was delivered at Frisbie's & Rappleye's office, in the basement of the Bryan block, about number 170, the deed of which this is a copy as I understand.

Q. No. 170 LaSalle street, in the city of Chicago?

A. Yes, sir.

Q. What parties were present at the time of delivering the deed?

A. Well I have no recollection of any one except Mr. Snow and

Mr. Daggett, myself, and there was of course always some one in the office attending to the business of the firm of Frisbie & Rappleye; but I think they had nothing to do with and had no interest in this transaction.

Q. State whether you went into the office with Mr. William C. Snow?

A. My impression is that I did; that I went over to his office and got him and went in with him.

Q. State whether or not that deed had already been made out; ready for delivery before you went into the office?

A. Yes, sir, it had; I gave some instructions in regard to the way the deed should be made, and I think it was made in accordance with those instructions.

Q. How long were you in the office before the deed was delivered by Mr. Snow to Mr. Daggett?

A. Well it was a very short time; I think we walked in together; Mr. Snow took the deed and handed it over immediately; I think perhaps before he took a seat; it certainly was not but a few minutes.

Q. Did Mr. Snow go out of the office?

117 A. Before the negotiation was completed he did; Mr. Daggett was to let him have some money, I think about four thousand dollars, and there was an interest note due; he gave Mr. Snow, I think, a certified check for just that amount and told him to go out and pay the note and return the note to him, which he did; I waited while it was done; he was gone but a few minutes.

Q. Mr. Snow?

A. Mr. Snow.

Q. State how long he was in the office after he returned to it?

A. Well, a very few minutes; of course I cannot say positively, but it was a very short time.

Q. Was the deed left with Mr. Daggett before he went out?

A. Yes, oh, yes; the deed was left while Mr. Snow went to pay this note.

Q. State, if you know, what the consideration of the deed was, of the sale of the property from Mr. Snow to Mr. Daggett?

(Objected to.)

A. I don't know that I understand the question; do you mean to ask me what he gave?

Q. Yes; what Mr. Daggett gave Mr. Snow.

(Objected to.)

A. Well, he gave him a number of railroad bonds.

Q. State whether or not there was any agreement connected with the sale in respect to Mr. Daggett loaning Mr. Snow any money, whether the sale was conditional upon any such loan, if you know, Mr. Pratt?

118 A. I shall have to diverge a little; Mr. Snow or Snow & Billings, who claimed to own the building would not part with the building unless they got four thousand dollars in money;

Mr. Daggett refused to pay that money; then Mr. Whipple and myself got together and tried to devise some plan by which we could bridge that difficulty, and we settled, if I recollect right, that we would get Mr. Daggett to loan Billings & Snow four thousand dollars on their note, their joint note, secured by a number of these bonds which he was to get, and the trade was finally consummated upon that basis.

Q. That he should loan them four thousand dollars on some of the bonds?

A. On Billing's & Snow's note, secured by a portion of these bonds that he was to get towards that building.

Q. As collateral security?

A. Yes; collateral security to the note, yes.

Q. State, if you know, how many times, if any, Mr. Snow saw Mr. Daggett before this sale of the property was concluded and the deed delivered?

(Objected to as immaterial.)

A. Well, I have no recollection of his ever seeing him at all; I have simply a vague remembrance of my taking him in once, but I cannot be positive about that, but I have not the slightest recollection of any other but that once, that making twice altogether.

Q. Once before the deed was actually delivered?

A. Yes, sir.

Q. State whether or not you had the whole conduct of the negotiation to its conclusion of the transfer of the property
119 from Mr. Snow to Mr. Daggett, representing Mr. Snow.

A. Well, I had the principal portion of it; I know I worked at it a good while to get the objections removed.

Q. State the substance of the conversation that occurred at the time of the delivery of the deed, before Mr. Snow got the money and went out to pay the interest to take up the coupon note.

A. Well, I cannot remember anything positive.

Q. State what occurred after he came back to the office, after taking up this note.

A. The trade was consummated; he had already delivered his deed, and he got the balance of the money; he had executed the note—in fact, he took the note in with him, and all he had to do was to get the balance of the money.

Q. State, Mr. Pratt, whether, at the time of the delivery of this deed, there was any conversation between Mr. Snow and Mr. Daggett about the payment of encumbrances at that time existing on this property.

(Solicitor for complainant objected to the question as immaterial, and on the further ground that the deed speaks for itself.)

A. I heard nothing of that kind.

Q. State, Mr. Pratt, whether, at the time of the delivery of this deed, if you know, whether there was any agreement made by Mr.

Daggett to Mr. Snow, that he would assume or pay off any encumbrances existing on this property at that time.

(Objected to on the same ground as the previous question.)

A. I heard nothing of the kind.

Q. State whether, or not, there was any agreement on the
120 part of Mr. Daggett to Mr. Snow, that he would assume or pay off any encumbrance existing on this property, at the other meeting that took place between Mr. Snow and Mr. Daggett, at which you were present; state, if you know.

(Objected to.)

A. No, I heard nothing of that kind.

Q. You were present at both of these times, and heard all of the conversation that occurred, Mr. Pratt?

A. Well, I was present, and probably heard all; I do not recollect any conversation that took place at either.

Q. You do not remember any talk about the assumption of encumbrances?

A. No, sir; nothing of the kind.

Q. Mr. Pratt, state, if you know, whether, at the time of this sale and purchase, Mr. Daggett purchased the mere equity of redemption, or purchased the property itself with the encumbrances?

(Objected to as being leading.)

A. Well, it was my understanding that he was buying the equity simply, and I am confirmed in that for this reason, he would not assume anything in his deed, and I instructed particularly that the deed should be made "subject" to the encumbrances, not to "assume" them, as Mr. Daggett would not take the property and assume.

Q. State, Mr. Pratt, what was talked over, if such conversation was had, between Mr. Snow and Mr. Daggett at these meetings as being the value of this property, subject to the encumbrances then existing on it.

(Objected to.)

A. I don't know that there was anything said about that;
121 at least I do not recollect anything.

Q. Mr. Pratt, the consideration mentioned in this deed is eighty-five thousand dollars; state if you know, whether or not that was the consideration of the sale and purchase of this property between Mr. Snow and Mr. Daggettt.

A. I do not think Mr. Daggett gave any instructions in regard to the amount of this consideration that should be expressed in the deed; I was present while Mr. Snow was drawing that deed, and he had already inserted eighty-five thousand dollars, and I said "that is too much;" I wanted it a pretty big consideration, but I said, "that is most too much;" "well," he said, "I have got it in, and it don't make any difference;" "no," said I, "that is all right

enough," and that is all I recollect in regard to the consideration; I don't think Daggett ever gave any instructions in regard to what the amount of consideration should be in the deed.

Q. Mr. Snow drew the deed himself?

A. Yes, it was drawn in the office there; Mr. Snow had it in his hand when I went in; I went in to see if it was ready.

Q. In Mr. Snow's office?

A. Yes, sir.

Q. State if you know whether Mr. Daggett ever gave any instructions as to what consideration should be inserted in the deed?

A. I have just stated I do not recollect of his ever saying anything about the consideration that should be expressed in the deed.

122 Q. State, Mr. Pratt, whether at the time of the delivery of this deed, or at any other time, you ever heard Mr. Daggett say that he considered these encumbrances being forty thousand dollars cash, and that he would have to pay it?

A. No, sir; I never heard him say that.

Q. You say that at the time of the delivery of this deed, you were at Rappleye & Frisbie's office, No. 170 La Salle street?

A. Yes, sir.

Q. When did the other meeting take place between Mr. Daggett and Mr. Snow?

A. I stated that I was not positive that they had ever had a meeting, but I simply got the impression that they had had one; if so, it must have been in the office; I cannot recollect anything particularly to place it positively.

Q. You cannot tell whether it was on La Salle street, or on Washington street?

A. I am certain, if they had a former interview, it was in the same place; at that time Mr. Daggett had no office on Washington street.

Q. Where did Mr. Whipple have an office at that time?

A. He was in the same office a good deal of the time, but he may have had his desk at No. 132 La Salle street, in his former office; I think perhaps his desk was left at No. 132; he had given up the room, and that was occupied by somebody else; my impression is, his desk was still at No. 132 La Salle street at that time.

Q. Mr. Pratt, here is a paper attached to the deposition of Isaac M. Daggett, in this case, dated the twelfth day of July, 1877, signed by Isaac M. Daggett, and to which there is a certificate at-

123 tached, signed by James L. High; signed by those names; look at the signature of Isaac M. Daggett, and state whether pou recognize it, and know it to be the genuine signature of Isaac M. Daggett.

A. I think that is his signature.

Q. You are acquainted with his signature?

A. Yes, sir.

Q. The signature of James L. High; state whether you know that to be the genuine signature of James S. High.

A. I have no doubt of it.

Q. You know his signature?

A. Yes, sir.

Cross-examination by Mr. BACON:

Q. As I understand you, Mr. Pratt, Mr. Snow drew this deed, a certified copy of which has been shown you; drew the original, I mean.

A. Yes, sir; that is it was drawn in the office; I don't know that he actually did it; my impression is he did, however; I think he was working at it when I went in.

Q. He took it with him when he went to Mr. Daggett's office, did he?

A. Yes, sir.

Q. Did Mr. Daggett examine it?

A. Yes, sir.

Q. You will not pretend to testify as to all of the interviews that may have taken place between Mr. Snow and Mr. Daggett, will you?

A. No, sir; I do not pretend to say that they did not have some other interviews; I say, I know of none.

124 Q. You only testify to those whereat you yourself were present?

A. Yes, sir.

Q. They may have had other interviews as far as you know, may they not?

A. Yes, sir; but I know of no other.

Q Do you know how many bonds Mr. Daggett gave to Mr. Snow?

A. No, sir; I do not recollect.

Q. Do you know anything about the amount of them; whether they were hundred dollar bonds or thousand dollar bonds?

A. They were thousand dollar bonds, face value.

Q. The face value of them was a thousand dollars?

A. Yes, sir.

Q. But after delivering all the bonds *to* Mr. Daggett loaned four thousand dollars on twenty of them, did he?

A. Yes, sir.

Q. As collateral security?

A. Yes, sir.

Q. You say that you understood that Mr. Dagget was purchasing the equity alone, was anything said about it in your presence at any time?

A. Well, no, sir; nothing except so far as making the deed, that he instructed me distinctly that he would not assume, and I had to instruct Mr. Snow in regard to making the deed.

Q. Then your idea is simply a conclusion or your own, from the

fact of the way he wanted the deed drawn, that he was purchasing the equity; is that what I understand you to say?

A. Well, yes; I inferred that from the instructions that I
125 received in regard to having the deed made that he would not assume; he told me distinctly he would assume nothing.

Q. You know nothing about the amount that made up the purchase price of the property then, do you?

A. No, sir. I do not know that there was any price mentioned to Mr. Daggett. I know the encumbrances were stated to him.

Q. You do not know the number of bonds that he gave, do you?

A. No, sir. I did at the time, but I have forgotten.

Q. Do you know the value that was put upon the bonds?

A. They had no market value, it was a trading value.

Q. Do you know what was their value, if they had any at all?

A. No, sir. I don't know.

Q. Then you don't know of your own knowledge what was the purchase price of that property, do you?

A. No, sir. I do not know.

Q. Then, I say, it is simply a conclusion from the way that the deed is drawn on your part that he was purchasing the equity only. Do I understand you that way, Mr. Pratt?

A. I don't know but you are right about it. That was the conclusion that I came to, and I gave you the reasons why.

Q. Now, Mr. Pratt, if you should find a deed from one party to another, and that deed should say "subject to certain encumbrances," would you assume from that alone that the grantee in that deed was simply purchasing the equity in that property?

126 (Solicitor for defendant objected to the question as irrelevant and immaterial.)

A. Yes, sir. I should conclude that that was *prima facia* evidence, but not conclusive evidence.

Q. Then that is all the real knowledge that you have as to whether he was purchasing the equity or not is what you have stated, and the form of the deed?

A. Yes, what I have stated.

Q. Whom did you consider you were acting for, Mr. Daggett or Mr. Snow?

A. I considered I was acting for Mr. Snow.

Q. Didn't you state in the direct examination that Mr. Daggett told you he wanted to get some pieces of property?

A. Yes, sir. If you will recollect, I hesitated a little what answer to make, because I was acting for both. I wanted to make the trade, and I was running to one and then the other and trying to get the trade through.

Q. Did you receive any commissions for making that trade?

A. Yes, sir.

Q. From whom?

A. My impression is, I received a commission from both sides. I think so.

Q. Then you were acting for both parties, were you?

A. Well, yes. I suppose you might consider it so. I was trying to get the trade through. I was first talking to one and then to the other.

Q. Did Mr. Daggett examine this deed before he took it from Mr. Snow?

A. Yes, sir. At the time of delivery do you mean?

127 Q. Yes.

A. Yes, sir; the deed was handed to Mr. Daggett; he read it over.

Q. And the bonds were then delivered?

A. Yes, sir.

Q. Was Mr. Daggett's attention called to the amount of the consideration in it; do you know anything about that?

A. I do not know that it was.

Q. Who first spoke to you about this property, Mr. Snow or Mr. Daggett?

A. Well, Mr. Bash first called my attention to the property, I believe.

Q. I do not refer to outside parties—either Mr. Snow or Mr. Daggett.

A. I don't know; I think Mr. Bash had the property for sale, and I told him I must deal with the owner, and he took me over and introduced me to Mr. Snow.

Q. And then you saw Mr. Daggett?

A. Yes, sir.

Q. Have you any recollection what you represented the property to be worth to Mr. Daggett?

(Solicitor for the defendants objecting to the question as immaterial and irrelevant.)

A. I don't recollect what I did; I considered that there was a good equity in it.

Q. Do you know anything about what valuation was put upon the property in your talk with Mr. Daggett?

A. Well, I think I told him that in my judgment the property was worth about fifty-five thousand dollars.

128 Q. Do you know what valuation you received commission on Mr. Pratt?

A. No, sir; I got a certain amount; we didn't reckon a percentage; I was to have so much for making the trade.

Q. In fixing that amount at so much, wasn't it based somewhat on a certain percentage upon a certain valuation?

A. No, sir.

Q. How did you get at that amount?

A. Well, I cannot tell you just how we did get at it; I think it

is likely I asked how much commission I was to have in case I got the trade through.

Q. It is customary, isn't it, in real estate trades generally, to have such a percentage upon certain valuations?

A. Well, that is the usual custom, yes, sir; sometimes, and very frequently it is done otherwise, however.

Q. And you are sure in this case the amount was not determined by percentage?

A. I am sure it was not.

Q. Do you know how much you received?

A. Well, no, sir; I can't remember how much; I expected you would ask me that question, and I was trying to anticipate it, but I can't remember just how much it was.

Q. How do you know how it was estimated, if you do not know the amount?

A. I knew I succeeded in getting the trades for quite a number of pieces of property, and not in a single instance was ever
129 percentage mentioned; I always had an understanding in advance how much I was to receive for getting the trade through.

Q. But generally, in fixing the amount you were to receive, was it not based upon some certain sum, or some percentage, or some valuation?

A. No, sir, not at all; valuation and values had nothing at all to do with the amount of compensation that I was to receive.

Q. But if you was making an exchange of property reasonably with a hundred thousand dollars, and also making an exchange of one with, say ten thousand dollars, wouldn't you be apt to make your amount fixed upon for the commissions in the hundred thousand dollar one more than in the other?

A. Yes, sir.

Q. Then was not the amount whatever amount you might have agreed upon determined somewhat by the valuation of the property that was sought to be exchanged?

A. I do not think it was, sir.

Q. It was ordinarily, was it not?

A. Well, in dealing with those parties, I don't think that ever had anything to do with the amount of compensation that I received. I received pay in a number of instances. I do not think in any instance the percentage was spoken of. I know it was not spoken of, and I scarcely think it was talked of. It was generally said, "Here, I will give you so much in case you succeed in getting that property for me."

Q. Have you any idea how much you received?

A. No, sir; I cannot tell that; it was not a very large
130 amount; my impression is it was three hundred dollars, and it is possible it might have been six.

Re-Direct Examination.

By Mr. BURGETT:

Q. Mr. Pratt, you have been asked about those bonds that have been spoken of—their market value; you may state, if you know, whether Mr. Snow attached any value to them?

(Objected to.)

A. Well, no; I could not tell what value was in his mind.
Q. You may state if you heard him say?
A. No, sir; I don't think I did.
Q. You may state whether or not you heard him say that he would not take the bonds unless Mr. Daggett would make him a loan of four thousand dollars on part of them?

(Objected to, as leading.)

A. Mr. Snow and Mr. Billings both told me they would not part with that property unless they got four thousand dollars.

Mr. BACON:

Q. Money?
A. Money.

Mr. BURGETT:

Q. That is, they would not take the bonds unless they could put them up and get a loan?
A. In a former part of my testimony I explained how we had to bridge that difficulty by getting a loan [on] the bonds.
131 Q. Mr. Pratt, did you state that the amount of your commissions in this sale or trade of this property was fixed absolutely?
A. Yes, sir.
Q. Before the trade was consummated?
A. Yes, sir.
Q. You made a number of trades for these parties?
A. Yes, sir.
Q. Different pieces of property?
A. Yes, sir.
Q. From Mr. Snow to Mr. Daggett?
A. There was only one between these parties.
Q. Between these parties, but for those parties?
A. No; I made some trades between Mr. Daggett and other parties, but none but this one with Mr. Snow.
Q. This is the only one you ever made with Mr. Snow?
A. Yes, sir; that is the only one I recollect.
Q. You afterwards made a number for Mr. Daggett?
A. Yes, sir.
Q. You may state if you know what market value these bonds had at the time of that sale and the delivery of the deed?

Objected to.

A. I know of no market value that they had.

Q. State what, if any, market value you think they had at that time?

A. I have no thought about it at all.

Re-cross examination by Mr. BACON:

Q. Do you know what bonds they were?

132 A. My impression is that they were the St. Lawrence & Hudson River Railroad bonds.

Q. Did you then have, or have you now, any knowledge in regard to it?

A. No, sir.

Q. Knowledge sufficient to form any opinion as to their market value or otherwise?

A. No, sir; I have got an impression that they are not [of] much value.

Q. Was any investigation made by you or anybody else as to the bonds then?

A. Not to my knowledge.

Q. Did you make any?

A. No, sir.

Q. Then you had no knowledge as an expert in regard to the value of the bonds at that time, had you?

A. No, sir.

LORENZO PRATT.

Subscribed and sworn to before me, this 16th August, 1879.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the U. States for the Northern District of Illinois.

133 In the Circuit Court of the United States for the Northern District of Illinois.

ANNIE E. HAYDEN, Complainant,
vs.
SOLOMON SNOW *et al.*, Defendants. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Friday, the 6th day of February, A. D. 1880.

Present: R. B. Bacon, for complainant, and Smith & Burgett, for defendant.

Jonas Hutchinson, a witness on behalf of the complainant, being first duly sworn, was examined-in-chief by Mr. Bacon, and deposes and says, as follows:

Interrogatory 1. Please state your name, age, residence, and occupation?

Answer. My name is Jonas Hutchinson; I am a lawyer; my residence is Chicago; I am of lawful age.

Q. Were you a practicing lawyer in the city of Chicago on the 12th day of April, 1876?

A. I was.

Q. Look at that instrument designated Exhibit "A," attached to the deposition of Isaac M. Daggett and Rodney M. Whipple, and state in whose handwriting that deed or exhibit is?

A. It is in mine.

Q. State with whom you were connected in business with, or had an office with about the time that deed was dated?

A. Silas S. Willard.

Q. Is he the party whose name appears attached to the notary's certificate?

134 A. He is.

Q. State if the said deed and all the written provisions therein was drawn according to instructions given to you; and, if so, who gave such instructions?

A. The deed is undoubtedly drawn pursuant to instruction given to me; that is my belief, and I think I received my instructions from Mr. Willard.

Q. Of your own knowledge do you know whether Mr. Willard was also doing business for those parties at this time?

A. He was.

Q. Did he examine the abstracts of title?

A. He did.

Q. State whether you had any conversation either before or very shortly after or about the time the deed was made, with Rodney M. Whipple or Isaac M. Daggett, in regard to the grantor in this deed, William Drury, assuming certain encumbrances?

A. I had a conversation about the time this transaction was consummated with Mr. Whipple, I think, either Mr. Whipple or Mr. Daggett; I think Mr. Whipple, in regard to—

Solicitor for defendant objected to all conversation had between Rodney M. Whipple and the witness.

A. In regard to this encumbrance being assumed by Mr. Daggett, I recollect of saying to Mr. Whipple, I think it was, or asking him, rather, if they were not giving Mr. Drury a pretty heavy dose in this transaction?

Q. Who was Mr. Whipple purporting to represent in this transaction?

Objected to.

135 A. I cannot state; I supposed he—I don't know who he was representing if he was not representing himself and Mr. Daggett; I supposed he was.

(Solicitor for the defendant objected to the witness stating what he supposed.)

Q. Were there any deeds prepared in your office at this time pertaining to this transaction?

A. There were other deeds.

Q. Do you know the number?

A. I could not state.

Q. This conversation—how you fix it; whether it was before or after he gave up the deeds to the parties?

A. I think it was before.

Q. Were the deeds delivered then in your office; that is, either to Mr. Daggett or somebody representing him?

A. They were.

Q. Were the deeds examined then, do you remember?

A. I don't recollect especially about that, but the best of my recollection is that the deeds were then examined.

Q. Was said deed, to the best of your knowledge and recollection, drawn according to instructions that were given by the parties?

A. It was.

Cross-examination.

By Mr. BURGETT:

Question. Mr. Hutchinson, did you ever meet Mr. William Drury; do you know him?

Answer. I don't know the gentleman; I don't recollect ever meeting him.

Q. You say you received your instructions respecting the drawing of this deed from Mr. Willard?

136 A. That is my best recollection. Mr. Willard has this business in charge, and my recollection is that I drew the deed; I drew this deed at any rate, and I think I drew the other deeds, but I would not speak definitely about that.

Q. Is your recollection at present clear as to the instructions you received respecting the form of this deed, and what was to be inserted in it—the written part?

A. I can't say that I recollect the particular instructions that Mr. Willard gave me about drawing this deed; I don't recollect the description of the property that he told me to make.

Q. You simply presume that you drew this deed in accordance with instructions given you?

A. I know that I did.

Q. You know that you would have drawn it in that way?

A. Yes, sir; I know that I would have drawn it in that way; I know that I had instructions to draw that deed as it is drawn, and that I received those instructions either from Mr. Willard or one of the parties to the transaction.

Q. Whom do you mean by one of the parties?

A. Either Mr. Whipple or Mr. Daggett.

Q. Then you can't say from which one of those three persons you did receive the instructions?

A. My recollection is, from Mr. Willard.

Q. This was in April, 1876, was it not?

A. I can tell by reference to the deed; my recollection is not clear without refreshing it (witness refers to deed); this deed is dated the 12th day of April, 1876.

Q. Then it would be about that date?

A. It is acknowledged on the same day.

137 Q. It would be about that date, then?

A. Yes, sir.

Q. Has Mr. Willard done business prior to that time for Mr. Whipple and Mr. Daggett?

A. I could not say. I never knew that he did any for Mr. Whipple before that. He had been acquainted, I think, with Mr. Daggett; knew who he was for some time. He may have done business for him before, but I don't recollect that he had done business for Daggett before. Still he may have done some.

Q. Do you say the abstracts of title covering the property included in this deed were in your office about that time?

A. No; I didn't state that. I stated that Mr. Willard examined the title to the property.

Q. Included in that deed?

A. As I understand, included in this deed, and perhaps in the other deeds. I know he had the business principally in charge, and he had the abstracts of title there, that he was examining, pertaining to this property.

Q. Making an examination for whom?

A. I don't know who it was that engaged him.

Q. Did you see any certificate made out by him respecting the title—as to the validity of the title?

A. No; I did not.

Q. You don't know from whom he received his instructions, who brought it, or from whom he got his pay for making the examination?

A. No; I do not.

Q. You say the deeds were examined in the office after they were drawn?

138 A. That is my recollection.

Q. Is it a very clear one?

A. Well, I am pretty clear that the parties were in there. My recollection is that Mr. Whipple was there, and I think Mr. Daggett. Mr. Daggett may not have been there. I think Mr. Chase was there.

Q. You think these were all of the persons that were there?

A. Mr. Willard and myself.

Q. And by the parties you mean those parties that you have mentioned?

A. Yes, sir. I don't recollect any other parties.

Q. You never saw Mr. Drury, and don't know him?

A. I have stated that I don't think I ever saw the man.

Q. Who took the deed away from your office after it was drawn?
A. Well, that I cannot state—which one of the parties took the deed.
Q. You never thought about the matter—those facts that we have talked of—from the time of drawing the deed down to its date, have you?
A. Yes, sir.
Q. When—about what time?
A. Well, I have thought of it several times. I probably did think of it several times after this transaction took place.
Q. What called your attention to it?
A. Well, I knew somewhat about the trades that Whipple and Daggett were making. I had known Mr. Whipple for a good while.
Q. You knew his character—reputation?
139 A. Yes, sir; knew his character. I have known the man for some time.

(Signature waived by agreement of counsel.)

It is agreed between the parties to this case that from the funds heretofore paid into this court by John M. Whitman, receiver in the case of Kelley *vs.* Snow *et al.*, being the surplus rents collected by him from the mortgaged premises, the sum of $433.13 has been paid over, by the order of court, to R. B. Bacon, as trustee of Annie E. Hayden, second mortgage, and that the same should be credited upon any amount found due upon the mortgage in the case of Hayden *vs.* Snow *et al.*

(Endorsed:) Filed Feb'y 13, 1880. Wm. H. Bradley, cl'k.

140 Depositions of Isaac M. Daggett and Rodney M. Whipple, taken by virtue of a commission issued out of said court on direct and cross-interrogatories, before George W. Ellis, Esq., commissioner at the city of New York, on the eleventh day of July, A. D. 1879.

Deposition of Isaac M. Daggett.

Interrogatory 1. What is your name, age, occupation and place of residence?
Answer. My name is Isaac M. Daggett; my age is forty-six (46); my occupation, merchant; my residence, New York city.
Int. 2. Are you one of the parties defendant to this suit?
Ans. Yes.
Int. 3. Do you know William C. Snow and William Drury, parties to this suit; and, if so, how long have you known them, respectively?
Ans. I know both William C. Snow and William Drury; I have known both of them about four (4) years.
Int. 4. State whether or not you ever owned the property known as the east half of lot two (2) in block thirty-three (3) in the orig-

inal town of Chicago, in the county of Cook, and State of Illinois. If you say you ever owned said property, state from whom, if from any one, you purchased the same, and when; and further state whether you ever received a deed for said property; and, if so, who was the grantor in such deed, and the date of such deed?

Ans. If that description means the *Minnesota Block*, on
141 Lake street, Chicago, I did. A trade was made for me for that block. The title came from William C. Snow, I think some time in January, 1876. The first [time] I ever saw Mr. Snow was when he came to hand me the deed at my office, No. 170 La Salle street, Chicago. William C. Snow was the grantor, and the deed was dated about January 28, 1876.

Int. 5. If in answer to the preceding interrogatory you shall have stated that you purchased said property of William C. Snow, and received from him a deed thereof, you may state what was the actual purchase price and real consideration paid, or agreed to be paid, by you for said property and the deed thereof?

Ans. My attention was called, by a gentleman named Pratt, to the property; he said that the equity in the property was for trade; the encumbrances on it being, at that time, forty thousand dollars ($40,000.) I was furnished with the key of the building, and with a prominent builder of Chicago went and examined the property, and on his statement to me that there was an equity of fully five thousand dollars ($5,000) in the property, I concluded to trade for it, the consideration being twenty thousand dollars, face value, of bonds of the Hudson and St. Lawrence River New York Railroad bonds. The exchange was consummated by my agreeing to loan four thousand dollars upon the bonds so paid, and the deed was handed to me in conformity with that arrangement. There was no other consideration. That was all there was about it.

Int. 6. If you ever purchased said property of William C. Snow, state whether $85,000.00 was the purchase price of said property agreed on between you and said Snow; whether you agreed
142 to pay said Snow $85,000.00 as the purchase price of said property, and whether, as part of the purchase price of said property, or on any other consideration, you ever agreed with said Snow to assume or pay any encumbrance on said property in the form of a trust deed or mortgage thereof, or in any other form?

Ans. I never knew that $85,000 had anything to do with the trade until I saw it mentioned in the deed; my only object being to know that it came subject to the encumbrance that was already on it. As I have already stated, nothing but the equity was traded for, and of course no encumbrances on said property, in any form whatever, were assumed or agreed to be paid.

Int. 7 If you ever purchased said property from William C. Snow, state whether at the time of such purchase you retained in your hands any part of the purchase price for the payment of any encumbrance on said property in the form of a trust deed or mortgage thereof, or in any other form, and whether such purchase

price, or any part thereof, was made up of any encumbrance on said property in the form of a trust deed or mortgage thereof, or in any other form?

Ans. I retained in my hands no part of the purchase money, the whole matter resting simply upon the value of the equity in the property.

Int. 8. State whether or not you ever sold said property to William Drury, and, if so, when; and the date of the deed, if you made one of said property, to said Drury?

143 Ans. I exchanged this property for a farm belonging to William Drury, of Mercer county, Illinois, the agreement being that he should take the equity, subject to the encumbrances, the same as I did. The date of the deed to Mr. Drury was April 12, 1876. I made a deed of said property, and I annex said deed to my deposition, the same being marked Exhibit "A."

Int. 9. If you ever conveyed said property to William Drury, state all the facts relating to and concerning such conveyance, the consideration, if any, for such conveyance, its nature, and of what composed, and whether said Drury ever agreed to pay you any sum of money as part of the consideration of such conveyance.

Ans. This interrogatory is answered in my answer to the eighth interrogatory.

Int. 10. If you ever conveyed said property to said Drury, state whether or not in consideration of such conveyance, or on any consideration, said Drury ever agreed with you that he would assume or pay any encumbrance on said property, in the form of a trust deed or mortgage thereof, or in any other form?

Ans. No; he did not.

Int. 11. If you ever conveyed, by deed, said property to said Drury, and said deed after reciting that such conveyance was made subject to a certain trust deed to E. C. Larned, trustee, and to a certain other trust deed to R. B. Bacon, contained a recital that the party of the second part in said deed, William Drury, assumed and agreed to pay said encumbrances, you may state whether or not the recital that said Drury assumed and agreed to pay said encumbrances was inserted in said deed in accordance with the intention and agreement of yourself and said Drury, or was so inserted through the mistake of the scrivener who drew the deed. You may further state when you first became aware of the presence of said recital in said deed, and who, if any one, first called your attention to the fact of its presence in said deed?

Ans. Mr. Drury was to take the property subject to the encumbrance of $40,000, but in drawing the deed a mistake was made by which mistake he was made to pay the encumbrances. I do not remember when I first became aware of that fact, or who first called my attention to it, but I think Mr. Burgett, the cashier of Mr. Drury, first called my attention to it.

144 Int. 12. State whether or not at any time, and, if so, when and how, you released said Drury from any apparent obligation

resting on him by reason of said recital in said deed, to pay off encumbrances on said property, in the form of trust deeds thereof, to E. C. Larned and to R. B. Bacon?

Ans. I rectified it by an instrument, dated the 12th of July, 1877, which I now produce and annex to my deposition, marked "Exhibit B."

Int. 13. If you ever conveyed by deed said property to William Drury, and said deed, after reciting that such conveyance was made subject to a certain trust deed to E. C. Larned, trustee, and a certain other trust deed to R. B Bacon, contained a recital that the party of the second party (William Drury) assumed and agreed to pay said encumbrances, you may state whether or not said recital was inserted in said deed for the benefit of the holders of the notes secured by said two trust deeds, or either of them?

Ans. No.

Int. 14. Do you know, or can you set forth any other matter or thing which may be of benefit or advantage to the parties to this cause, or either of them, or that may be material to the subject of your examination, or the matters in question in this cause. If yea, set forth the same fully and at large in your answer?

Ans. No.

145 *Cross-Interrogatories.*

1 X-Int. What did you consider the property in question worth at the time of the conveyance of it to you by William C. Snow?

Ans. Five thousand dollars over and above the encumbrances.

2 X-Int. What did you give said Wm. C. Snow for said property?

Ans. I have answered this in my answers to the direct interrogatories.

3 X-Int. If, in answer to foregoing interrogatory, you state that you gave him certain railroad bonds, state how many such bonds you gave to him and the aggregate amount of said bonds, and what was the market valuation of said bonds at the date of such conveyance?

Ans. The question is answered, except as to the market value, in the previous answers; there was no market value to those bonds.

4 X-Int. State how the amount of $85,000 came to be inserted in said deed as the consideration therein; at whose instance was said amount therein inserted, and if it represented the true amount of the consideration of said deed, state of what it was composed—whether money, bonds, or what otherwise?

Ans. I have no knowledge as to how the amount of consideration was placed in the deed, or at whose instance; I saw the amount was in the deed when the deed was handed to me, but, as I was purchasing the equity, I did not care anything about it; it did not represent the true amount—that was fictitious entirely.

ISAAC M. DAGGETT.

[No copy, folio 146.]

Direct interrogatories numbers ten and eleven, to Isaac M.
147 Daggett propounded, are objected to by complainant's solicitor, as being incompetent, contradicting, and varying a written instrument.

Direct interrogatory number twelve, to Isaac M. Daggett propounded, is objected to by complainant's solicitor, as asking for a legal conclusion.

Direct interrogatory number thirteen, to Isaac M. Daggett propounded, is objected to by complainant's solicitor, as being incompetent.

148 EXHIBIT "A."

Deed from Daggett to Drury.

This indenture, made this twelfth (12th) day of April, in the year of our Lord one thousand eight hundred and seventy-six, between Isaac M. Daggett and Sarah E. Daggett, his wife, of the city of Chicago, in the county of Cook, and State of Illinois, party of the first part, and William Drury, of New Boston, in the county of Mercer, and State of Illinois, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of seventy-five thousand (75,000) dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, have granted, bargained, sold, remised, released, conveyed, aliened, and confirmed, and by these presents do grant, bargain, sell, remise, release, convey, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all the following-described lot, piece or parcel of land situated in the county of Cook, and State of Illinois, and known and described as follows, to wit: the east half of lot two (2), in block thirty-three (33), in the original town of Chicago, subject to a certain trust deed executed by Solomon Snow and Elizabeth L., his wife, to E. C. Larned, trustee, to secure payment of twenty-eight thousand dollars ($28,000), executed July 28th, 1875, due five years from date, with interest at ten per cent per annum, payable semi-annually.

149 Also subject to another trust deed executed by said Solomon Snow and wife to R. B. Bacon, to secure the payment of twelve thousand dollars ($12,000), dated July 28th, 1875, due two and three years from date, with interest at eight per cent. per annum, payable semi-annually, *both of which said encumbrances the party of the second part herein assumes and agrees to pay*, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate right, title, interest, claim, or demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments

and appurtenances. To have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

And the said Isaac M. Daggett, party of the first part, for himself and his heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in law, in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and encumbrances of what kind or nature soever, and the above bargained premises in the quiet and peaceable
150 possession of the said party of the second part, his heirs and assigns, against all and every other person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend.

And the said party of the first part hereby expressly waive and release any and all right, benefit, privilege, advantage and exemption under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise.

In witness whereof, the said party of the first part have hereunto set their hands and seals, the day and year first above written.

ISAAC M. DAGGETT. [SEAL.]
SARAH E. DAGGETT. [SEAL.]

STATE OF ILLINOIS, } *ss:*
County of Cook, }

I, Silas S. Willard, a notary public in and for the said county, in the State aforesaid, do hereby certify that Isaac M. Daggett and Sarah E. Daggett, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this twelfth (12th) day of April, A. D. 1876.

[SEAL.] SILAS S. WILLARD,
Notary Public.

151 (Endorsed.)

STATE OF ILLINOIS, } *ss:* No. 82,116.
County of Cook, }

This instrument was filed for record in the recorder's office of

Cook county aforesaid, on the 22d day of April, A. D. 1876, at 10 o'clock a. m., and recorded in Book 648 of Records, on page 463.

JAMES STEWART,
Recorder.

152 EXHIBIT "B."

Deed of Release from Daggett to Drury.

Whereas I, Isaac M, Daggett, of Chicago, Illinois, did on the 12th day of April, A. D. 1876, sell and convey to William Drury the following described lands and premises, situated in the county of Cook, and State of Illinois, and known and described as follows, to wit:

The east half of lot two (2), in block thirty-three (33), in the original town of Chicago, subject to a certain trust deed executed by Solomon Snow and Elizabeth L. Snow, his wife, to E. C. Larned, trustee, to secure payment of $28,000, executed July 28th, 1875, due five years from date, with interest at 10 per cent. per annum, payable semi-annually, subject also to another trust deed executed by said Solomon Snow and wife to R. B. Bacon, trustee, to secure payment of $12,000, dated July 28th, 1875, due in two and three years from date, with interest at 8 per cent. per annum, payable semi-annually, interest to commence October 31st, 1875.

And whereas in and by the deed of conveyance executed by me on said 12th day of April, 1876, conveying said premises to said Drury, it is recited that said Drury assumes and agrees to pay said encumbrances on said premises, being the trust deeds above specified.

And whereas at the execution and delivery of said deed of conveyance it was the intention of said Drury and of the undersigned that said Drury should not assume or incur any liability to pay said encumbrances or either of them.

And whereas the recital in said deed of conveyance of an assumption and agreement to pay said encumbrances, by said Drury,
153 was and is a mistake in the execution of said deed and contrary to the intention of all parties thereto.

Now therefore in consideration of the premises and for the purpose of correcting such mistake as aforesaid, and in consideration of one dollar and other valuable consideration to me in hand paid by said Drury, I, the said Isaac M. Daggett, do hereby forever release and discharge the said William Drury, his heirs and representatives, of and from and from any and all liability, obligation, claim, demand, or right of action of any nature whatsoever arising or accruing from or out of such assumption and agreement to pay said encumbrances, hereby meaning and intending to fully and forever discharge said Drury from any and all liability on account thereof.

In witness whereof, I have hereunto set my hand and seal, at Chicago, this 12th day of July, A. D. 1877.

ISAAC M. DAGGETT. [SEAL.]

STATE OF ILLINOIS, } ss:
County of Cook, }

I, James L. High, a notary public in and for said county, in the State aforesaid, do hereby certify that Isaac M. Daggett, [——] his wife, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

154 Given under my hand and notarial seal this 13th day of July, A. D. 1877.

[SEAL.] JAMES L. HIGH,
Notary Public.

(Endorsed:)

STATE OF ILLINOIS, } ss: No. 143,174.
County of Cook, }

Recorded July 18, 1877, 1 o'clock p. m. Book 729 of Records, page 283.

JAS. W. BROCKWAY,
Recorder.

155 *Deposition of Rodney M. Whipple.*

Interrogatory 1. What is your name, age, occupation, and place of residence?

Answer. My name is Rodney M. Whipple; my age is forty-four, (44;) my occupation a merchant; I am temporarily residing in New York.

Int. 2. Do you know William C. Snow, Isaac M. Daggett, and William Drury, parties defendant to this suit, and how long have you known them respectively?

Ans. I know William C. Snow, Isaac M. Daggett, and William Drury, parties defendant to this suit—I know them all; I have known said Daggett about four years, said Drury about three years and a half, and said Snow about four years.

Int. 3. If you know, state whether or not said Isaac M. Daggett ever owned the property described as the east half of lot two (2) in block thirty-three (33), in the original town of Chicago, in the county of Cook, and State of Illinois; and, if so, you may state if you know from whom, if any one, he purchased the same and received a deed thereof, and when?

Ans. I know that he did own the property described in the question in 1876, and bought the same of William C. Snow. He received a deed thereof from said Snow during the winter of 1876; I think in the month of January; I could not state the precise date.

Int. 4. If, in answer to the preceding interrogatory, you shall have stated that said Daggett purchased said property of said Wil-

liam C. Snow and received a deed thereof from him, you may staet if you know and how you know what was the *real* consideration paid by said Daggett for said property, whether $85,000.00
156 was the purchase price of said property agreed on between said Daggett and said Snow; whether said Daggett agreed to pay said Snow $85,000.00 as the purchase price of said property; whether as part of the purchase price of said property said Daggett agreed with said Snow to assume or pay any encumbrance on said property in the form of a trust deed or mortgage thereof or in any other form; whether such purchase price or any part thereof was made up of any such encumbrance, and whether, at the time of such purchase, said Daggett retained in his hands any part of the purchase price for the payment of any such encumbrance?

Ans. I know of the purchase; the trade was made through Lorenzo Pratt, a broker, and the trade was not for the property, but for the equity in the property above the mortgages. Mr. Daggett bought the property subject to a mortgage of $28,000, and subject to one of $12,000, agreeing to give fifty (50) bonds of some railroad in New York State, which was never built. Mr. Snow agreed to take the bonds provided Mr. Daggett would loan him four thousand (4,000) dollars on twenty of the bonds, which Mr. Daggett agreed to do. Mr. Snow and Mr. Billings gave their note for four thousand dollars, secured by twenty bonds, and have never paid it yet. I believe both of them have gone through bankruptcy. The property, encumbered as it was, was estimated at that time to be worth from five thousand to ten thousand dollars—not over that. We offered the equity for ten thousand dollars, but could not get it. I know these facts from having negotiated the trade myself. Eighty-five thousand dollars was not the purchase price; it was so
157 many bonds as above stated, given for the equity. Mr. Daggett did not agree to give $85,000, and did not agree that the mortgages should be any part of the payment thereof. He did not assume or agree to pay any encumbrance on the property in any form whatever. At the time of said purchase Mr. Daggett did not retain in his hands any part of the purchase price for the payment of any encumbrances. I have stated the transaction fully.

Int. 5. If you know, state whether or not said Daggett ever sold said property to said Drury; and, if so, when, and the date of the deed, if said Daggett made one of said property to said Drury, and how you know such facts?

Ans. Said Daggett did sell said property to said William Drury, for Mercer county, Illinois, property, and gave a deed for the same on the twelfth (12th) day of April, 1876; I know such fact, because I negotiated the trade between said Daggett and said Drury.

Int 6. If said Daggett ever conveyed said property to said Drury, state all the facts you may know, if any, relating to and concerning such conveyance; and state further, if you know, the real consideration for such conveyance, (if one was made,) its nature, and of what composed, and whether said Drury ever agreed to pay said

Daggett any sum of money as part of such consideration; and, if so, whether such sum of money was, in fact, paid by said Drury to said Daggett?

Ans. Mr. Daggett made an exchange with Mr. Drury for his farm in Mercer county, and, as part payment for that farm, he agreed to transfer the equity of this property. The agreement was made with Mr. Drury, who took the property subject to $40,000
158 encumbrances, all interest and taxes to be paid to date; he was to assume no encumbrance, under any circumstance, that being one of the express conditions of the sale. In the deed drawn by the conveyancer, Mr. Williard, a mistake was made in that it was therein expressed that he was to assume and pay. That was an error on the part of the conveyancer, as I have stated, as the express agreement was that he should not assume and pay. Sometime afterwards Mr. Drury discovered that he had made this mistake of assuming the encumbrance on account of said clerical error on the part of the conveyance, and he requested Mr. Daggett to execute a release, which Mr. Daggett did, on the 12th of July, 1877. Said Daggett did execute a release to said Drury, a release of any obligation to pay any of the above-mentioned mortgages or trust deeds, thus carrying out the contract as agreed upon. Said Drury never did agree, to my certain knowledge, to pay said Daggett said mortgage, or any sum of money, as part of the consideration. I made the entire transaction myself, and know that it was simply an exchange of property, no cash passing and no cash being agreed to be paid, and it was not based upon cash but upon proximate values.

Int. 7. If said Daggett ever conveyed said property to said Drury, state, if you know, whether or not, in consideration of such conveyance, said Drury agreed with said Daggett that he would assume or pay any encumbrance on said property, in the form of a trust deed or mortgage thereof, or any other form; and state further how you know such facts, if you shall state that you know the same.

159 Ans. I know that he was not to pay any money or assume any encumbrance; it was expressly stipulated that no money was to pass and no encumbrances to be assumed; the reason I know of this fact was because all the negotiations in the trade were made by me, as Mr. Daggett and myself were associated together in business at that time; he (said Drury) did not assume or agree to pay any encumbrance in the form of trust deed or mortgage or any form whatever.

Int. 8. If said Daggett ever conveyed by deed said property to said Drury, state, if you know, whether it was the agreement or intention of the parties to such deed that such deed should contain a recital to the effect that said Drury was to assume or pay any encumbrance on said property in the form of a trust deed thereof to E. C. Larned, trustee, or a trust deed thereof to R. B. Bacon, or in any other form; and if you state that you know such facts, state how you know the same.

Ans. I know that he was not, because the deed was not to be

made to assume any encumbrance in any form whatever, but he was simply to buy the equity, and the deed was to be made to him subject to two trust deeds—one to said Larned, trustee, and one to said Bacon, trustee; the matter was thoroughly talked over and thoroughly understood and agreed upon before the trade was made; one great point that was made in negotiating the trade was that the said Drury was not to be obliged to pay or assume anything, but was simply buying the equity, as Mr. Daggett had bought the property in that way; it was not the intention of Mr. Daggett
160 or Mr. Drury that any such clause should be inserted in the deed; the insertion of the clause to assume and pay was by an error of the conveyancer, who was instructed both by Mr. Daggett and Mr. Drury to draw it differently; I expressly told Mr. Williard, who drew the deed, that no such clause was to be inserted; in the exchange made with Mr. Drury, four (4) pieces of property were conveyed to Mr. Drury, each piece was encumbered, and the deeds of the three pieces other than this piece were properly drawn, containing no clause that Mr. Drury was to assume and pay any encumbrance; this deed, although one of the four under the same agreement, was by a mistake drawn with a clause inserted, that he was to assume and pay; it was entirely the result of a mistake of the conveyances; I know these facts, as I was acting for Mr. Daggett, and was interested in the trade; I did all the negotiating on the part of Mr. Daggett.

Int. 9. Do you know, or can you set forth, any other matter or thing which may be of benefit or advantage to the parties to this cause, or either of them, or that may be material to the subject of your examination, or the matters in question in this cause; if yea, set forth the same fully and at large in your answer?

Ans. He doth not.

RODNEY M. WHIPPLE.

Direct interrogatory number seven, to Rodney M. Whipple propounded, is objected to by complainant's solicitor as incompetent. Direct interrogatory number eight, to Rodney M. Whipple propounded, is objected to by complainant's solicitor as incompetent, the written instrument being the best evidence of the agreement of the parties.

J. V. LE MOYNE,
Compl't's Sol'r.

161 (Endorsed:) Rec'd and filed July 17, 1879. Opened for Mr. Burgett, att'y for def't Drury, July 17, 1879. W. H. Bradley, cl'k.

162 Afterwards, to wit, on the twenty-sixth day of October, A. D. 1880, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

111-223

IN THE

SUPREME COURT of the UNITED STATES,

OCTOBER TERM, A. D. 1883.

WILLIAM DRURY,
Appellant,

vs.

ANNIE E. HAYDEN,
Appellee.

Appeal from the Circuit Court of the United States, Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

J. M. H. BURGETT, ABNER SMITH AND U. P. SMITH,

COUNSEL FOR APPELLANT.

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
1883.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

WILLIAM DRURY,
Appellant,
vs.
ANNIE E. HAYDEN,
Appellee.

Appeal from the Circuit Court of the United States, Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

I.
*STATEMENT OF CASE.

This is an appeal from a *decree in equity* rendered against appellant, Drury, a remote grantee of mortgaged premises, in favor of appellee, the holder of the mortgage, for the full amount of the mortgage-notes, $15,194.21. The decree is founded upon an alleged liability of appellant, growing wholly out of a clause of assumption of payment of such notes contained in the deed taken by him of the mortgaged premises.

The question presented by the pleadings and evidence in this case is this:

*Assignment of Errors, post, p. 13.

Can Hayden, the holder of mortgage notes, who has taken an assignment of the same after the recording of a deed of conveyance of the mortgaged premises from a grantor (Daggett), not personally liable for the payment of the mortgage-debt, enforce payment of such notes by the grantee in such deed (Drury), such deed containing a clause reciting that the grantee in the deed has agreed to pay the mortgage-debt, but such clause having been inserted in the deed by mistake of the scrivener that drew it, and without the knowledge and contrary to the intention of the parties to the deed, and the grantee in the deed having, as soon as he became aware that the deed contained such clause, procured from his grantor, and recorded a written release under seal of all obligation and liability to pay the mortgage debt by reason of such clause of assumption, and it not appearing that the holder of the notes (Hayden) was induced to purchase the notes by any apparent liability to pay them on the part of the grantee in such deed (Drury), or did purchase them relying on such apparent liability, or had notice until long after the recording of such release of any apparent liability on the part of such grantee (Drury) to pay the notes, or of the conveyance of the mortgaged premises to such grantee (Drury)?

CASE AS MADE BY PLEADINGS.

The original bill in equity in this case was filed by appellee, January 26, 1878, to foreclose a trust deed (mortgage), dated July 28, 1875, given by Solomon Snow to Roswell B. Bacon, as trustee, to secure the payment of two notes of even date with the trust deed for $6,000 each, payable in two and three years after date respectively, made by Solomon Snow to his own order, and by

him endorsed to J. E. Lockwood, said mortgage *being recorded in the recorder's of Cook County, July 31, 1875*, and being subject to a prior incumbrance by trust deed (mortgage) to E. C. Larned, as trustee, to secure the payment of $28,000. The bill alleges that after the making of the mortgage to secure the notes to Lockwood, Solomon Snow conveyed the mortgaged premises to William C. Snow, "subject," however, to the said two incumbrances, and that William C. Snow conveyed to Isaac M. Daggett "*all his right, title and interest in and equity of redemption*" of said premises, "subject," however, to the said incumbrances; and that on April 12, 1876, Daggett conveyed to appellant, Drury, by deed recorded in the recorder's office April 22, 1876, "*all his right, title, interest and equity of redemption*" in and to said premises, and that said incumbrances formed part of the consideration or purchase money of the premises agreed to be paid by Drury to Daggett, and that the deed from Daggett to Drury contained a clause *whereby* the latter assumed and agreed to pay said incumbrances in the following words:

"Subject to a certain trust deed executed by Solomon Snow and Elizabeth L., his wife, to E. C. Larned, trustee, to secure the payment of $28,000, dated July 28, 1875, due five years from date, with interest at ten per cent. per annum, payable semi-annually; also subject to another trust deed executed by Solomon Snow and wife, to R. B. Bacon, to secure the payment of $12,000, dated July 28, 1875, due two and three years from date, with interest at 8 per cent. per annum, payable semi-annually. *Both of which said incumbrances the party of the second part herein assumes and agees to pay.*"

The bill further alleges that about November 1, 1876, for a valuable consideration paid to him, Lockwood assigned the notes to complainant. The bill also alleges default in the payment of the interest due on the notes, which default, by the terms of the mortgage, allowed the

holder of the notes to declare the debt due and payable immediately, and that she had declared it so due; and that appellant had, as she was informed and believed, paid some interest on the notes.

Prayer was for foreclosure of the mortgage and sale of the mortgaged premises, and in case the proceeds of the sale should not be sufficient to satisfy the amount due, then a personal decree for deficiency against Drury, the appellant.

Answer of Drury admitted the making of the notes and mortgage and the conveyance of the equity of redemption of the mortgaged premises by the mortgagor to William C., Snow, and by the latter to Daggett, and by Daggett to himself, and that the deed from Daggett to himself contained the clause of assumption set out in the bill, but denied there was any agreement between Daggett and himself that he would assume or pay either of the incumbrances. He alleged that the clause of assumption in the deed to him from Daggett, viz.: "*Both of which said incumbrances the party of the second part herein assumes and agrees to pay,*" was inserted therein by the mistake of the scrivener that drew the deed, and contrary to the intention and without the knowledge of either himself or Daggett at the time of the execution and delivery of the deed; that he (Drury) did not know that said clause was contained in the deed until long after its delivery, and that as soon as he became aware that the deed did contain such clause, he went at once to Daggett who, for the purpose of correcting the mistake of the scrivener in inserting such clause in the deed, and to effectuate the intention and agreement of the parties to the deed at the time of its execution and delivery, executed and delivered to him, long prior to the filing of

complainant's bill, an instrument under seal releasing him from liability and obligation to pay said incumbrances. Complainant filed the general replication to this answer.

Supplemental Bill was filed by complainant, February 17, 1880, stating, in substance, that since the filing of the original bill, a bill had been filed in this court against Drury and others, by one Kelley, the holder of the indebtedness secured by the first mortgage for $28,000; and that such proceedings had been had under said bill that on June 27, 1878, a decree of foreclosure had been entered upon said mortgage and the mortgaged premises sold for the satisfaction thereof, on July 26, 1878, and that no redemption had been had from said sale, and a deed had been made to the purchaser by the Master in Chancery on October 30, 1879; and that the security of complainant for the payment of the notes held by her had thereby become exhausted, and prayed that Drury be decreed to pay to complainant the amount found due upon said notes.

Answer of Drury to the supplemental bill admits exhaustion of the mortgage security, as alleged by the complainant, denies complainants' right to the relief sought, and refers to his answer to the original bill, and prays that the same may be taken as part of answer to the supplemental bill. General replication filed.

SUMMARY OF CASE MADE BY PLEADINGS.

By the filing of the supplemental bill the suit became a suit in equity by appellee, the holder of the mortgage-notes, to enforce payment of the notes by appellant. The mortgagor and intermediate grantees were made parties. To maintain her suit against appellant, the appellee alleged in her bill that after her mortgage had been

recorded, Daggett, a remote grantee of *the equity of redemption* of the mortgaged premises of the mortgagor, had conveyed to appellant by deed recorded in the recorder's office on April 22, 1876, "*the equity of redemption*" of said premises; that said mortgage formed a part of the consideration and purchase price of said premises in said conveyance from Daggett to appellant, and that the deed from Daggett to Drury contained a clause *whereby* the latter assumed and agreed to pay said mortgage in the following words (setting out the clause reciting that conveyance was made subject to incumbrances and that the grantee assumed and agreed to pay same); and that appellant had, as she was informed and believed, paid some interest on said notes; and that Lockwood assigned the notes to appellee about November 1, 1876. *But the appellee did* not *allege that she was induced to purchase the notes by any apparent liabilitity to pay them on the part of appellant, or did purchase them, relying on such apparent liability, or that at the time she purchased the notes she knew of such apparent liability or of the conveyance of such equity of redemption to appellant; nor did she allege the delivery to appellant of the deed containing the clause of assumption, or its acceptance by him, or that he caused such deed to be recorded; nor did she allege any liability on the part of Daggett, appellant's grantor, for the payment of the notes, but simply alleged that the mortgagor's grantee, William C. Snow, had conveyed to Daggett the equity of redemption of said premises.*

Answers of appellant denied that he had ever assumed or agreed to pay the mortgage-debt; and averred that the assumption clause was inserted in the deed to him by mistake of the scrivener that drew it, and without the knowledge and contrary to the intention of himself and

his grantor, and that as soon as appellant became aware that the deed contained such clause, his grantor did, in order to correct the mistake of the scrivener and effectuate the intention and agreement of himself and his grantor at the time of the execution and delivery of the deed, execute to him, long prior to the filing of appellee's bill, a release under seal, from all obligation and liability arising from such clause of assumption.

Decree against appellant for the amount due on the mortgage notes.

THE EVIDENCE.

The answer admits the making of the notes and trust deed, and the conveyance of the *equity of redemption* by Solomon Snow, mortgagor, to William C. Snow, and by the latter to Daggett, and by Daggett to Drury, appellant. The deed to Drury is shown at page 79 of printed record; the release from Daggett to Drury is shown at page 81 of printed record; the deed to Daggett is shown at page 43 of printed record. *Appellee's witnesses* were William C. Snow, the grantor of Daggett, and Jonas Hutchinson, the scrivener that drew the deed to Drury. *Appellant's witnesses* were Drury, Daggett, his grantor, and Rodney M. Whipple and Lorenzo Pratt, who negotiated the sale of the premises to Daggett, and afterwards to Drury.

DAGGETT'S LIABILITY FOR INCUMBRANCES.

WILLIAM C. SNOW testified that on the sale to Daggett, the estimated value of the property was $85,000, and that Daggett paid him for the property in bonds the estimated excess in value of the property, above existing incumbrances; that Daggett never told him or promised

him that he would pay such incumbrances (*Printed Record, p. 40*).

DAGGETT testified that he traded some railroad bonds for the *equity of redemption* in the premises, and did not assume or agree to pay any incumbrances; and that the incumbrances formed no part of the purchase price of the premises, and that he retained no part of the purchase money, "the whole matter resting simply upon the equity in the property" (*Printed Record, p. 76*); that he did not know how $85,000 came to be put in the deed as the consideration, or at whose instance; that that sum did not represent the true amount, but was fictitious; that he saw that amount was in the deed when Snow handed it to him, but, as he was purchasing the *equity*, he did not care anything about it. (*Printed Record, pp. 76, 78.*)

WHIPPLE testified that he negotiated the trade for Daggett; that the trade was not for the property, but for the *equity* in the property above incumbrances; $85,000 was not the purchase-price; it was certain bonds given for the *equity;* the incumbrances formed no part of the consideration; Daggett did not assume or agree to pay any incumbrance on the property, nor retain in his hands any part of the purchase for the payment of incumbrances. (*Printed Record, p. 83.*)

LORENZO PRATT testified, that he negotiated the trade between Snow and Daggett; that he acted for Snow (*Printed Record, p. 67*); that the deed was drawn in Snow's office and delivered in Daggett's; that, in regard to making the deed, Daggett told him distinctly that he would assume no incumbrances, and how to have the deed drawn; that witness gave particular instructions that the deed

should be made " subject " to the incumbrances, not to assume them, as Daggett would not take the property and assume the incumbrances (*Printed Record, pp. 62, 64, 66, 67*); that the day the deed was delivered he went to Snow's office to see if the deed was ready, and found that $85,000 had been inserted in the deed as the consideration, and told Snow that was too much, and Snow said: " Well, I have got it in, and it don't make any difference." (*Printed Record, pp. 64–5, 62*); I understood at the time that Daggett was trading some bonds for the *equity of redemption* merely; I think Snow saw Daggett but twice; I was present; I heard no conversation between Snow and Daggett about the payment or assumption of incumbrances on the property, or any agreement by Daggett that he would assume or pay off the incumbrances. (*Printed Report, pp. 63–4, 66–7.*)

DRURY'S LIABILITY FOR INCUMBRANCES.

DRURY testified that he exchanged certain farm lands in Mercer County, Illinois, for the *equity of redemption* in four pieces of incumbered Chicago property (*Printed Record, p. 50.*) It was distinctly understood and agreed between Daggett and myself, at the time we traded, that I was not to assume or become accountable for any incumbrance; I never assumed or agreed to pay any incumbrance on the property (*Printed Record, pp. 51, 54*); Daggett prepared his deed and executed it in Chicago, and brought it down to me in Mercer County, and I did not discover of the clause reciting that I agreed to pay the incumbrances (*Printed Record, p. 51*); there were incumbrances on all the property conveyed to me by Daggett, but the other three deeds did not have such a clause (*Printed Record, pp. 51, 55*); the clause of assump-

tion of incumbrances was inserted in the deed from Daggett to me wholly contrary to our agreement; it was distinctly and expressly agreed between Daggett, Whipple and myself that I should not assume the payment of any incumbrance, and that the deed should be drawn simply "subject" to incumbrances (*Printed Record, p. 54*); I gave Daggett my deed and received the deeds from him, supposing they were agreeable to our contract and bargain; I never accepted the deed with the knowledge that it contained a clause of assumption of incumbrances on the property, and would not have taken the deed had I seen the clause; when I said I "accepted" the deed, I mean I "received" it (*Printed Record, pp. 51, 55, 57*); the incumbrances on the property mentioned in the deed from Daggett did not form any part of the consideration of the conveyance of the property to me (*Printed Record, p. 51*); the consideration in the deed was put in by Daggett, and was what they claim the property was worth; I supposed it made no difference (*Printed Record, p. 51*). My attention was first called to the presence of the assumption clause in the deed in April, 1877, by E. C. Larned, the trustee in the first incumbrance; I was trying to get a reduction of interest, and he told me that I had assumed and there was an assumption clause in the deed; I said there was no such clause in it, I had read the deed, and the agreement was that there should be none; the deed was in Whipple's possession, as agent, and Larned got a copy and convinced me that the clause was in the deed. On becoming aware of the presence of that clause in the deed, I went immediately to Daggett and informed him of the discovery of this clause in the deed contrary to our agreement; he seemed much surprised and said the clause was not intended to be, and certainly was not in the

deed; but when the deed was hunted up, Daggett said the insertion of the clause was a mistake of the man that drew the deed, and that he would do anything requisite to correct the error (*Printed Record, p. 52*). The release, dated July 12, 1877, attached to Daggett's deposition, was executed by him to correct the error in the deed to me, by which I was made to assume the incumbrances mentioned in the deed (*Printed Record, pp. 51, 54*). Pretty soon after I got the property I paid some interest to Lockwood, who then held the incumbrance (*Printed Record, pp. 56, 58*).

DAGGETT testified that he exchanged the property with Drury for a farm, the agreement being that Drury should take the *equity*, "subject" to the incumbrances. Drury never agreed with me that he would assume or pay an incumbrance on the property; he was to take the property subject to the incumbrance of $40,000, but in drawing the deed a mistake was made, by which mistake he was to pay the incumbrances; the recital in the deed to Drury that he assumed and agreed to pay the incumbrances, was not inserted in the deed for the benefit of the holder of either mortgage; I rectified the mistake in the deed by instrument dated, July 12,1877, and annexed to my deposition as "Exhibit B." This deed of release, dated July 12, 1877, and recorded July 18, 1877, recites the deed of conveyance from Daggett to Drury, and that it was the intention of the parties to it that Drury should not assume or incur any liability to pay either incumbrance on the property, and that the clause of assumption of incumbrances was inserted in the deed by mistake and contrary to the intention of the parties, and that for the purpose of correcting such mistake, and in consideration of one dollar in hand paid, Daggett released and dis-

charged Drury of and from all liability, obligation, and right of action of any nature, arising or accruing from or out of such assumption and agreement to pay incumbrances. (*Printed Record, pp. 81, 77–8.*)

WHIPPLE testified that he negotiated the trade between Daggett and Drury; that Daggett made an exchange with Drury for his farm, and as part payment for the farm he agreed to transfer the *equity* of this property to Drury, who took the property subject to incumbrances; it was one of the express conditions of the sale that Drury was to assume no incumbrance; a mistake was made in the deed drawn by the conveyancer, Willard, in that it was expressed that Drury was to assume and pay; that was an error on the part of the conveyancer; some time afterward Drury discovered that by a clerical mistake of the conveyancer he was made to assume the incumbrances, and at his request Daggett executed a release July 12, 1877, to Drury, of any obligation to pay either incumbrance, thus carrying out the contract as agreed upon. Drury never did agree, to my certain knowledge, to pay the incumbrances or any sum of money; it was simply an exchange of property, no cash being agreed to be paid; Drury did not assume or agree to pay any incumbrance; it was expressly stipulated that he was to assume no incumbrance; I know this, because I was associated in business with Daggett at the time, and interested in the trade, and all the negotiations in the trade were made by me; it was not the agreement or intention of Daggett or Drury that the deed should contain the recital that Drury was to assume or pay any incumbrance on the property; it was thoroughly understood and agreed before the trade, and made one of its conditions, that Drury was not to be obliged to pay or assume any incumbrance, but was simply

buying the as *equity* Daggett had bought it, and the deed was not to be made to assume any incumbrance; the clause of assumption was inserted in the deed by error of the conveyancer, Willard, who was expressly instructed by Daggett and myself that no such clause was to be inserted. In the exchange with Drury, four pieces of property, each of which was incumbered, were conveyed to Drury, and the deed of this property alone, although one of four deeds drawn under the same agreement, contained a clause of assumption of incumbrances. (*Printed Record, 83-5.*)

HUTCHINSON, complainant's witness, testified that he is a lawyer; that he had an office with Willard, the conveyancer, and drew the deed from Daggett to Drury, according to instructions given him by Willard; that he did not recollect the particular instructions that Willard gave him about drawing the deed; that he does not know Drury, and does not think he ever saw him; and that the deed was delivered to Daggett, or some one representing him. (*Printed Record, pp. 72–3.*)

II.

ASSIGNMENT OF ERRORS.

First—The Circuit Court erred in finding that the defendant, William Drury, was personally liable to the complainant for the payment of the notes described in the bill of complaint and made by Solomon Snow, and secured by the trust deed to R. B. Bacon, and in entering a decree that said Drury pay to the complainant the amount found due on such notes.

Second—The Circuit Court erred in entering a decree in favor of the complainant, against the defendant, William Drury.

Third—The decree below is not sustained by the evidence.

III.

*BRIEF.

FIRST.

THE QUESTION INVOLVED IN THIS CASE OF THE LIABILITY OF APPELLANT, DRURY, FOR THE PAYMENT OF THE MORTGAGE HELD BY THE APPELLEE, IS A QUESTION OF GENERAL JURISPRUDENCE, AND THIS COURT IS NOT BOUND BY STATE DECISIONS.

Olcott v. *Supervisors*, 16 Wall. 678, 689.
Chicago v. *Robins*, 2 Black, 418, 428.
Russell v. *Wheaton*, 12 Wheat. 139.
Swift v. *Tyson*, 16 Pet. 1, 18.
Foxcroft v. *Mollett*, 4 Wheat. 353.
Venice v. *Murdock*, 92 U. S. 494, 501.
Burgess v. *Seligman*, 107 U. S. 20.

SECOND.

THE BILL OF COMPLAINT DID NOT ALLEGE THE DELIVERY TO DRURY OF THE DEED CONTAINING THE CLAUSE OF ASSUMPTION OR ITS ACCEPTANCE BY HIM (THOMPSON V. DEARBORN, 107 ILL. 87), OR THAT HE CAUSED SUCH DEED TO BE RECORDED, OR THAT DAGGETT, HIS GRANTOR, WAS LIABLE FOR THE PAYMENT OF THE MORTGAGE DEBT; AND, THEREFORE, IF THE

*See *post* pp. 60, 16, 17, 18, 24, 32 Argument, *post*, p. 37.

ACCEPTANCE OR RECORDING OF THE DEED BY DRURY, OR SUCH LIABILITY ON THE PART OF DAGGETT, BE NECESSARY TO UPHOLD THE DECREE IN THIS CASE, THE DECREE CANNOT STAND.

AND IT MUST BE PRESUMED THAT APPELLEE WAS NOT INDUCED TO PURCHASE THE MORTGAGE NOTES BY ANY APPEARANCE OF LIABILITY ON THE PART OF DRURY TO PAY THEM, AND DID NOT PURCHASE THEM RELYING ON ANY SUCH APPEARANCE OF LIABILITY; AND THAT AT THE TIME THE NOTES WERE ASSIGNED TO HER SHE DID NOT KNOW OF ANY SUCH APPEARANCE OF LIABILITY OR OF THE CONVEYANCE TO DRURY OF THE MORTGAGED PREMISES; FOR THERE ARE NO ALLEGATIONS TO THE CONTRARY IN HER BILL OF COMPLAINT, NOR ANY EVIDENCE THAT SHE HAD ACTUAL NOTICE OF THE DEED TO DRURY. (See *post*, p. 40.)

Battle v. *Insurance Co.*, 10 Blatchf. 417.
Moran v. *Palmer*, 13 Mich. 367, 372.
Cameron v. *Abbott*, 30 Ala. 416.
Bank v. *Schultz*, 3 Ohio, 62.
Jackson v. *Ashton*, 11 Pet. 229.
Foster v. *Goddard*, 1 Black, 506, 518.
Rubber Co. v. *Goodyear*, 9 Wall, 788, 793.
Bradley v. *Converse*, 4 Cliff. 366.
Cucullu v. *Hernandez*, 103 U. S. 105, 116.
Robinson v. *Harwell*, 6 Ga. 589, 599.
Green v. *Covilland*, 10 Cal. 317.
Skinner v. *Bailey*, 7 Conn. 496.
Rowan v. *Bowles*, 21 Ill. 17.
Helm v. *Cantrell*, 59 Ill. 524.
Kellogg v. *Moore*, 97 Ill. 282.

Assent to assumption clause not presumed from record of deed.

When a deed contains a clause, reciting that the grantee has assumed and agreed to pay the incumbrances on the property, there is no presumption from the record of the deed that the grantee has accepted it, and assents to such recital.

Thompson v. *Dearborn*, 107 Ill. 87.
Higman v. *Stewart*, 38 Mich. 513.
Judson v. *Dada*, 79 N. Y., 373.

*THIRD.

THE REGISTRY OF THE DEED FROM DAGGETT TO APPELLANT WAS NOT CONSTRUCTIVE NOTICE TO APPELLEE OF THE CLAUSE OF ASSUMPTION IN SUCH DEED; FOR SUCH AN ASSUMPTION IS NOT AN ESSENTIAL PART OF THE DEED AS A CONVEYANCE, BUT ONLY A PERSONAL COVENANT OF THE GRANTEE, AND APPELLEE CLAIMED A LIEN ON THE PREMISES, NOT THROUGH DAGGETT, APPELLANT'S GRANTOR, BUT THROUGH A MORTGAGE MADE BY SOLOMON SNOW, AND RECORDED IN JULY, 1875, WHILE THE DEED TO APPELLANT WAS RECORDED IN JANUARY, 1876. (*See bill, printed Record, p. 3.*)

The registry act of Illinois is:

"All deeds, mortgages and other instruments in writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice," etc. R. S. of Ill., 1874, chap. 30, sec. 30.

The record of a deed containing a contract to assume an incumbrance, is not constructive notice to any person of the presence of such contract in the deed.

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*See *post* pp. 37, 41-2.

Thompson v. *Dearborn*, 107 Ill. 87.
Judson v. *Dada*, 79 N. Y. 373.
Osborn v. *Cabell*, (Va.) 7 Va. Law J. 352.

The record of the deed to appellant was not constructive notice of such deed to appellee.

Mead v. *Parker*, 29 Hun, 62, 66.
Miller v. *Larned*, 103 Ill. 562, 577.
Alvis v. *Morris*, 63 Ill. 181, 183.
Trustees v. *Wheeler*, 61 N. Y. 88, 108-9.
King v. *McVickar*, 3 Sandf. Ch. 193, 208-9.
Hay v. *Bramhall*, 19 N. J. Eq. 563, 565-6, 571-2.
McIlvaine v. *Mut. Ass. Co.*, 93 Pa. St. 30.
Stuyvesant v. *Hone*, 1 Sandf. Ch. 423; S. C. on appeal, 2 Barb. Ch. 151, 158.
Ely v. *Wilcox*, 20 Wis. 523, 529, 530.
Conn. v. *Bradish*, 14 Mass. 296, 303.
George v. *Allen*, 9 Allen, 80, 83.
Leach v. *Burton*, 33 Vt. 195, 199.
Holly v. *Hawley*, 39 Vt. 522, 532.
Dewey v. *Ingersoll*, 42 Mich. 17.
Matteson v. *Thomas*, 41 Ill. 110, 113.
Iglehart v. *Crane*, 42 Ill. 261, 268.
Hosmer v. *Campbell*, 98 Ill. 572, 578-9.

*FOURTH.

APPELLANT DID NOT AGREE WITH HIS GRANTOR, DAGGETT, THAT HE WOULD PAY THE MORTGAGE DEBT, AND THE ASSUMPTION CLAUSE WAS INSERTED IN THE DEED FROM DAGGETT BY MISTAKE AND CONTRARY TO THE AGREEMENT OF APPELLANT AND HIS GRANTOR.

See *post* p. 37.

See the testimony *ante p.* 9–13; the testimony of appellant is shown in the printed record at pp. 49, 57; of Daggett at pp. 77–8, 81; of Whipple, who negotiated the trade between appellant and Daggett at pp. 83–5; of Hutchinson, the scrivener, at pp. 73–5.

Parol evidence of mistake in deed admitted.

That the clause making the grantee in the deed assume the payment of incumbrances was inserted in the deed by fraud or mistake of the grantor, or scrivener, and contrary to the agreement of the grantee, may be shown in defense by parol evidence.

Elliott v. *Sackett*, U. S. S. C., 2 Sup. Court Rep. 375, 381.
Kilmer v. *Smith*, 77 N. Y. 226.
Albany. Sav. Bk. v. *Burdick*, 87 Id. 40.
King v. *Woodbridge*, 34 Vt. 565.
Higman v. *Stewart*, 38 Mich. 513, 524.
Fuller v. *Lemar*, 53 Iowa, 477
Huebsch v. *Scheel*, 81 Ill. 281, 283–4.
Thompson v. *Dearborn*, 107 Id. 87.
Hubbard v. *Ensign*, 46 Conn. 576, 585.
Culver v. *Badger*, 29 N. J. Eq. 74.
Wyche v. *Green*, 11 Ga. 159.
Bradford v. *Union Bk.*, 13 How. 57, 66.
Herman on Estoppel, § 248.

*FIFTH.

IF APPELLANT HAD MADE A VALID AGREEMENT WITH HIS GRANTOR (DAGGETT) TO PAY THE MORTGAGE DEBT, APPELLEE COULD NOT HAVE MAINTAINED AN ACTION AT LAW AGAINST HIM; FOR THERE WAS NO PRIVITY OF CONTRACT BETWEEN APPELLANT AND APPELLEE.

*See *post* p. 43.

DAGGETT WAS NOT LIABLE FOR THE PAYMENT OF THE MORTGAGE DEBT. NO PART OF THE PURCHASE PRICE AGREED TO BE PAID BY APPELLANT FOR THE MORTGAGED PREMISES WAS RETAINED BY HIM FOR THE PAYMENT OF THE MORTGAGE; AND THE EVIDENCE (DAGGETT'S TESTIMONY AT PAGE 78, OF PRINTED RECORD), SHOWS THAT THE CLAUSE OF ASSUMPTION WAS NOT INSERTED IN THE DEED BY DAGGETT FOR THE BENEFIT OF APPELLEE.

Hicks v. *McGarry*, 38 Mich. 667.
Halsted v. *Francis*, 31 Id. 113, 115.
Booth v. *Conn. L. Ins. Co.*, 43 Id. 299.
Ayres v. *Gallup*, 44 Id. 12.
Meech v. *Ensign*, 49 Conn. 191.
Osborne v. *Cabell*, (Va.) 7 Va. Law J. 352, 355.
Willard v. *Worsham*, (Va.) 7 Va. Law J. 153, 160–1.
Crowell v. *Currier*, 27 N. J. Eq. 152.
Crowell v. *Hospital*, 27 Id. 650.
Klapworth v. *Dressler*, 13 Id. 62, 66.
Jarman v. *Wiswall*, 24 Id. 267, 269.
Bull v. *Titsworth*, 29 Id. 73.
Stevenson v. *Black*, 1 Id. 338.
Hay v. *Bramhall*, 19 Id. 570.
Prentice v. *Brimhall*, 123 Mass. 291.
Lock v. *Homer*, 131 Id. 93.
Exchange Bank v. *Rice*, 107 Id. 37.
Coffin v. *Adams*, 131 Id. 133.
Pettes v. *Peppard*, 120 Id. 522.
Mellen v. *Whipple*, 1 Gray, 317.
Robb v. *Mudge*, 14 Id. 534, 538–9.
Cragin v. *Lovell*, U. S. S. C., 3 Sup. Ct. Rep. 132, 135.
National Bank v. *Grand Lodge*, 98 U. S. 123.
Riddle v. *Brizzolara* (Cal. 1883) 12 Pac. Coast L. J. 344

Tweddle v. *Atkinson*, 1 Best. & S. 393.
Mulholland v. *Merriam*, 19 Grant's (U. C.) Ch. 288, 294.
Crowe v. *Rogers*, 1 Strange, 592.
Price v. *Easton*, 1 Nev. & M. 303; 4 B. & Ad. 433.
1 Langdale's Cases of Cont. (2d ed.) 170–4.
Warren v. *Batchelder*, 15 N. H. 129.
Owings v. *Owings*, 1 Harr. & G. (Md.) 484.
Salmon v. *Brown*, 6 Blackf. (Ind.) 347.
Britzell v. *Fryberger*, 2 Cart. (Ind.) 176.
Conklin v. *Smith*, 7 Ind 108.
Goodenow v. *Jones*, 75 Ill 48.
Page v *Becker*, 31 Mo. 467.
Manney v. *Frazier*, 27 Mo. 419.
Lockwood v. *Benedict*, 3 Edw. (N. Y.) Ch. *472.
Merrill v. *Green*, 55 N. Y. 270.
1 Story on Cont. (5th ed.) § 485.
Dicey on Parties, §§ 78–85.
Tweddell v. *Tweddell*, 2 Bro. C. C. *101, *108, *152, *154.
Barham v. *Thanet*, 3 Myl & K. 607, 624.
Marcot v. Van Metre, 33 N. J. Eq. 262, 265
Hall v. Boutcher, 17 Vt. 244

And in the cases in Pennsylvania, New York, Illinois and other states, where the mortgagee has been permitted to maintain an action at law against the grantee of mortgaged premises, the grantee has purchased not simply the equity of redemption, as in this case, but has agreed to pay for the land its full value, and has retained in his hands, for the payment of the mortgage debt, a part of the purchase price equal to such debt.

Brewer v. *Maurer*, 38 Ohio St. 543, 549.

Merriman v. *Moore*, 90 Penn. St. 78.
Dean, use, etc., v. *Walker*, 107 Ill. 540.
Wynn v. *Wood*, 97 Penn. St. 216.
Girard L. Ins. Co. v. *Stewart*, 86 Id. 89.
Hoff's Appeal, 24 Id. 200, 205.
Lennig's Estate, 52 Id. 135, 139.
Davis' Appeal, 89 Id. 272.
Ins. Co. v. *Addick*, 12 Phila. 490.
Burr v. *Beers*, 24 N. Y. 178.
Thorp v. *Keokuk Coal Co* , 48 Id. 253.
Dyermand v. *Chamberlin*, 22 Hun. 110.
Urquhart v. *Brayton*, 12 R. I. 169.
Greenwood v. *Sheldon*, Minn., 17 Rep. 115.
Campbell v. *Smith*, 71 N. Y. 26, 28.
Walden v. *Karr*, 88 Ill., 49, 52.
See *Higman* v. *Stewart*, 38 Mich. 513, 523.

But the courts of other States hold that there is no fund in the hands of the grantee for the payment of the mortgage, and that the obligation of the grantee to pay the mortgage debt is merely *ex contractu*.

Prentice v. *Brimhall*, 123 Mass. 291.
Nebraska Nat. Bank v. *Nebraska City*, 14 Fed. Rep. 763, 766, per McCrary, J.
Robb v. *Mudge*, 14 Gray, 534, 538–9.
Merrill v. *Green*, 55 N. Y. 270.
Meech v. *Ensign*, 49 Conn. 191, 205.
Fisk v. *Tolman*, 124 Mass. 254.
Youngs v. *Trustees*, 31 N. J. Eq. 290.
Mount v. *Van Ness*, 33 N. J. Eq. 262, 265.
Tweddell v. *Tweddell*, 2 Bro. C. C. *101, *108, *152, *154.
Barham v. *Thanet*, 3 Myl. & K. 607, 624.

The old cases (*Dutton* v. *Poole*, 1 Vent. 6; *Felton* v. *Dickinson*, 10 Mass. 287; *Schemerhorn* v. *Vanderheyden*, 1 Johns. 139) permitted a stranger to a contract to maintain an action upon it, if he stood in such a relationship to the contracting party that it must be considered that the contract was made for his benefit. But the law was not settled then as it is now, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained, nor was it settled that the promisee cannot maintain an action unless the consideration moved from him.

Tweddle v. *Atkinson*, 1 Best & S. 293.
Mulholland v. *Merriam*, 19 Grant (U. C.) Ch. 288, 294.
Meech v. *Ensign*, 49 Conn. 191, 203, 209, 210.
Mellen v. *Whipple*, 1 Gray, 317, 323.
King v. *Whitely*, 10 Paige, 465, 468.
Colyear v. *Mulgrave*, 2 Keen, 98.
Story Cont. (5th ed.) § 486.
1 Addison Cont. (Morgan's ed.) § 33, p. 59.
Leake Cont., 443.
Pollock Cont., 196.
Dicey on Parties, §§ 84, 85.

All post p. 45-6
Hall v. Hantoan, 1704, 2d

To entitle a plaintiff to sue upon a contract to which he was not a party, it is held necessary, in those States where such action is permitted, that it must be manifest from the nature or terms of the agreement, or the relationship of the parties, that the promise was made *primarily* for the plaintiff's benefit; it is not enough that the plaintiff would be *incidentally* benefitted by the performance of the contract; the *object* of the contract must have been to confer a benefit upon him.

Austin v. *Seligman*, 18 Fed. Rep. 519, per Billings, J.
Simson v. *Brown*, 68 N. Y. 355.
King v. *Whitely*, 10 Paige, 465, 468–9, per Walworth, Ch.
Peddie v. *Brown*, 3 Jurist, N. S. 895.
Vrooman v. *Turner*, 69 N. Y. 280, 283–4.
Meech v. *Ensign*, 49 Conn. 191, 203, 209–10.
Treat v. *Stanton*, 14 Id. 446.
Judson v. *Dada*, 79 N. Y. 379.
Miller v. *Winchell*, 70 Id. 437.
Pardee v. *Treat*, 82 Id. 385, 388.
Lake Ontario, etc., R. v. *Curtiss*, 80 N. Y. 219.
Crampton v. *Ballard*, 10 Vt. 251, 253.
Davis v. *Clinton*, 54 Iowa, 59.
National Bank v. *Grand Lodge*, 98 U. S. 123.
Greenwood v. *Sheldon*, Minn., 17 Rep. 115.

Furthermore, the courts which permit the plaintiff to sue upon a contract to which he was not a party, hold that a mere volunteer, a mere stranger, cannot intervene and claim by action the benefit of a contract between other parties, and that there must be some obligation or duty owing from the promisee to the plaintiff which will give him a legal or equitable claim to the benefit of the promise. This is not new doctrine.

Vrooman v. *Turner*, 69 N. Y. 280, and cases cited.
Lawrence v. *Fox*, 20 Id. 268, 269, 270.
Pardee v. *Treat*, 82 Id. 385, 388.
Dunning v. *Leavitt*, 85 Id. 30.
Farlow v. *Kemp*, 7 Blackf. (Ind.) 504.

Ferris v. *Carson*, 16 Nev. 44.
Dutton v. *Poole*, 1 Vent. 318.
2 Story's Eq. Juris., § 973.
Cashman v. Henry, 55 How. Pr. 234, 239.
(Riddel v. Brizzolara (Cal. 1863) 12 Pacif. Coast L. J. 344, 352

*SIXTH.

THE RIGHTS OF A MORTGAGEE TO THE BENEFIT OF THE AGREEMENT OF THE PURCHASER WITH HIS VENDOR TO PAY THE MORTGAGE DEBT ARE PURELY DERIVATIVE, AND TO BE WROUGHT OUT THROUGH THE RIGHTS OF SUCH VENDOR AS THEY EXIST AT THE TIME THE MORTGAGEE SEEKS TO AVAIL HIMSELF OF THE BENEFIT OF SUCH AGREEMENT; AND THE MORTGAGEE IS NOT ENTITLED TO AVAIL HIMSELF OF THE BENEFIT OF SUCH AGREEMENT, UNLESS SUCH VENDOR IS LIABLE TO HIM FOR THE PAYMENT OF THE MORTGAGE DEBT. THEREFORE, THE DECREE AGAINST APPELLANT IS ERRONEOUS, FOR NOT ONLY WAS DAGGETT NOT LIABLE FOR THE PAYMENT OF THE MORTGAGE DEBT (*Printed Record, pp. 75–7, 82–3, 60–7, 40; ante pp. 7–9, 14*), BUT HE HAD RELEASED APPELLANT FROM ALL OBLIGATION TO PAY THE MORTGAGE DEBT, BEFORE APPELLEE FILED HER BILL, AND EVEN BEFORE SHE KNEW OF THE ALLEGED AGREEMENT OF APPELLANT TO PAY SUCH DEBT (*See testimony, Printed Record, pp. 77–8, 81, 84, 52–4*); AND THE ASSUMPTION CLAUSE WAS INSERTED IN APPELLANT'S DEED BY MISTAKE. (*See ante Fourth Point, p. 17.*)

No fixed right vested in the mortgagee.

If clause in deed was originally binding on appellant there was no trust created for the security of the mortgage debt.

*See *post* p. 47.

Young v. *Trustees*, 31 N. J. Eq. 290 [illegible]
Marsh v. *Pike*, 1 Sandf. Ch, 210.
Prentice v. *Brimhall*, 123 Mass. 291.
Fisk v. *Tolman*, 124 Id. 254.
Nebraska Nat. Bk. v. *Nebraska City*, 14 Fed. Rep. 763, 766, per McCRARY, J.
Meech v. *Ensign*, 49 Conn. 191.
Brewer v. *Maurer*, 38 Ohio St. 543, 554.
Biddle v. Brizzolara, 12 Pacif. Coast L.J. 344 352

No fixed right vests in the mortgagee by reason of the agreement of the purchaser with his vendor. Between themselves alone does the vendor become a surety, and the purchaser the principal debtor. The mortgagee is allowed to have the benefit of such agreement in *equity* on the doctrine that a *creditor* may have the benefit of all obligations which one standing in the relation of a surety holds for his personal indemnity and may, by a mere rule of procedure, go directly against such purchaser *to avoid circuity and multiplicity of actions*. But the mortgagee can only be subrogated to the rights of his *debtor*, subject to all the equities between the purchaser and his vendor.

Youngs v. *Trustees*, 31 N. J. Eq., 290, 299.
Coffin v. *Adams*, 131 Mass. 131, 136–7.
Osborne v. *Cabell* (Va. 1883). 7 Va. Law J. 352.
Baumgardner v. *Allen*, 6 Munf. (Va.) 439, 445.
Crowell v. *Hospital*, 27 N. J. Eq. 650, 656.
Crowell v. *Currier*, 27 Id. 152.
Wise v. *Fuller*, 29 Id. 257 261.
Bull v. *Titsworth*, 29 Id. 73.
Klapworth v. *Dressler*, 13 Id. 62, 66.
Hay v. *Bramhall*, 19 Id. 563, 570.
Pruden v. *Williams*, 26 Id. 210.

Huyler v. *Atwood*, 26 Id. 504, 506.
King v. *Whitely*, 10 Paige (N.Y.), 467.
Halsey v. *Reed*, 9 Id. 445.
Marsh v. *Pike*, 1 Sandf. Ch. 210.
Deyermand v. *Chamberlin*, 20 Hun, 110.
Pardee v. *Treat*, 82 N. Y. 385, 388–9.
Higman v. *Stewart*, 38 Mich. 513, 523.
Crawford v. *Edwards*, 33 Id. 354.
Miller v. *Thompson*, 34 Id. 10.
Hicks v. *McGarry*, 38 Id. 667.
Comstock v. *Hitt*, 37 Ill. 542, 548.
Hammer v. *Johnson*, 44 Id. 192.
Corbett v. *Waterman*, 11 Iowa, 86.
Fithian v. *Monks*, 43 Mo. 502, 519–20.
Bissell v. *Bugbee*, U. S. C. C., Ind., per Gresham, J., 7 Reporter, 550.
Brandt on Suretyship, §§ 285, 284.
Mount v. *Van Ness*, 33 N. J. Eq. 262, 265.
Riddel v. *Brizzolara*, 12 Pacif. Coast R. J. 344

In Indiana, Illinois, New York, Pennsylvania and other States, when a mortgagee is allowed to enforce payment of the mortgage by the purchaser of the mortgaged premises who has agreed with vendor to pay the same, the remedy is really given upon the same equitable principle whereby the mortgagee is simply subrogated to the existing rights of his debtor ; and the mortgagee is allowed to enforce such rights in an action of assumpsit *to avoid circuity and multiplicity of actions.*

Brewer v. *Maurer* 38 Ohio St. 543, 549, 554.
Taylor v. *Taylor*, 20 Ill. 650, 653.
Walden v. *Karr*, 88 Id. 49, 52.
Prather v. *Vineyard*, 4 Gilm. (Ill.) 40, 44, 48.
Belden v. *Perkins*, 78 Ill. 449, 451.

Davis v. *Halloway*, 30 Ind. 112, 114.
Devol v. *McIntosh*, 23 Id. 529.
Miller v. *Billingsly*, 41 Id. 489, 491.
Campbell v. *Patterson*, 58 Id. 66.
Mansur v. *Bartholomew*, Ind. per ELLIOTT, J., 19 Albany L. J. 52.
Sanderson v. *Lamberton*, 6 Binn. (Pa.) 129.
Deyermand v. *Chamberlin*, 22 Hun, 110.
Pardee v. *Treat*, 82 N. Y. 385, 388–9.
Cashman v. *Henry*, 55 How. Pr. 234, 239.
Biddel v. Brizzolara, 12 Calif. Court L. J. 344, 352

Even according to *Lawrence* v. *Fox* (20 N. Y. 268), no right of action vests in the creditor until he *elects* to avail himself of the promise and ratifies the acts of the promisee, who has assumed to act as his agent in procuring the promise; the law will not presume the acceptance of the promise by the creditor, and until he notifies the parties that he will accept the benefit or terms of the contract, it is a mere proposition to him.

Talburt v. *Berkshire Ins. Co.*, 80 Ind. 434, 441–2.
Durham v. *Bischoff*, 47 Ind. 211.
Knickerbocker Ins. Co. v. *Nelson*, 78 N. Y. 137, 152–3, and cases cited.
Gilbert v. *Sanderson*, 56 Iowa, 349.
Davis v. *Calloway*, 30 Ind. 112.
Thompson v. *Parker*, 83 Ind. 96, 107–8.
Trimble v. *Strother*, 25 Ohio St. 378.
Bissell v. *Bugbee*, U. S. C. C., per GRESHAM, J., 7 Reporter, 550.
Trustees v. *Race*, 16 Ga. 486, 489–490.
Ridge v. *Olmstead*, 73 Mo. 578.
Briggs v. *Block*, 18 Id. 281.

Hartman v. *Olivera*, 54 Cal. 261.
Finney v. *Finney*, 16 Pa. St. 380, 384.
Jones v. *Higgins*, 80 Ky. 409.
Wyman v. *Smith*, 2 Sandf. (N. Y.) 331.
Seaman v. *Whitney*, 24 Wend. 260.
Kelly v. *Roberts*, 40 N. Y. 432.
Winkley v. *Foye*, 33 N. H. 171.
Gibson v. *Minet*, 1 C. & P. 247.
Owen v. *Bowen*, 4 Id. 93.
Scott v. *Porcher*, 3 Meriv. 652.
Hawkeye v. *Hunter*, Peake's Add. Cases, 107.
Tiernan v. *Jackson*, 5 Peters, 580, 598–9.
Dicey on Parties, 93–101.
1 Addison Cont. (Morgan's ed.), sec. 34.
2 Story's Eq., secs. 1041, 1046.
Thorp v. *Keokuk Coal Co.*, 48 Id. 253, 257.
Turk v. *Ridge*, 41 N. Y. 201, 206.
Auburn Bank v. *Leonard*, 40 Barb. 119.
Motley v. *Insurance Co.*, 29 Me. 337.
Bristow v. *Lane*, 21 Ill. 194, 198.
Sanderson v. *Lamberton*, 6 Binn. (Pa.) 129.
Johnson v. *Collins*, 14 Iowa, 63, 65.
Warren v. *Batchelder*, 16 N. H. 580.
Morgan v. *Overman*, 37 Cal. 534, 557.
McLaren v. *Hutchinson*, 18 Id. 344, 347.
Ridge v. *Olmsted*, 73 Mo. 578.
Anthony v. *Herman*, 14 Kans. 494, 496.

Riddel v. Brizzolara, 12 Pac. Coast L.J. 344-352

There being no fixed right vested in the mortgagee under such an assumption clause in the deed, and Daggett having executed the release to appellant before appellee sought to avail herself of the benefit of such clause, or knew of it, the release discharged appellant of all obligation under such clause, if originally liable.

Youngs v. *Trustees*, 31 N. J. Eq. 290, 299.
Marsh v. *Pike*, 1 Sandf. (N. Y.) Ch. 210.
Meech v. *Ensign*, 49 Conn. 191, 205.
Crowell v. *Hospital*, 27 N. J. Eq. 650.
Laing v. *Byrne*, 34 Id. 52.
Crowell v. *Currier*, 27 Id. 152.
O'Neil v. *Clarke*, 33 Id. 444.
Trusdell v. *Price*, 29 Id. 620, 624
Stephens v. *Casbacker*, 8 Hun, 116.
Simson v. *Brown*, 68 N. Y. 355.
Knickerbocker Ins. Co. v. *Nelson*, 78 N.Y. 137, 152–3.
Devlin v. *Murphy*, 5 Abb. New Cases, 242.
Whiting v. *Gearty*, 14 Hun, 498.
Talburt v. *Berkshire Ins. Co.*, 80 Ind. 434, 441–2.
Thompson v. *Parker*, 83 Ind. 96, 107–8.
Davis v. *Calloway*, 30 Ind. 112.
Durham v. *Bischoff*, 47 Ind. 211.
Mansur v. *Bartholomew*, Ind., per Elliott, J. 19 Albany Law J. 52.
Miller v. *Billingsly*, 41 Ind. 489, 492.
Gilbert v. *Sanderson*, 56 Iowa, 349.
Cohrt v. *Kock*, 56 Id. 658.
Trimble v. *Strother*, 25 Ohio St. 378.
Brewer v. *Maurer*, 38 Ohio St. 543, 554.
Jones v. *Higgins*, 80 Ky. 409.
Wyman v. *Smith*, 2 Sandf. 331.
Seaman v. *Whitney*, 24 Wend. 260.
Kelly v. *Roberts*, 40 N. Y 432.
Winkley v. *Foye*, 33 N. H. 171, and cases last cited.
1 Addison Cont. (Morgan's ed.), § 34.

Dist Empress Eng. Co, L. R. 16 Ch. Div. 125, 127, 129
Biddel v. Brizzolara, 12 Cal. Cont. L. J. 344, 352

2 Story's Eq., § 1196, 1036 b.
Swarts v. *Earls*, 53 Ill. 237.

Daggett was not liable for the payment of the mortgage debt, and therefore appellee could derive no benefit from such clause, if valid.

King v. *Whitely*, 10 Paige, 465.
Trotter v. *Hughes*, 12 N. Y. 74.
Ford v. *David*, 1 Bosw. 569.
Doolittle v. *Naylor*, 2 Id. 206, 225.
Stebbins v. *Hall*, 29 Barb. 524, 537.
Vrooman v. *Turner*, 69 N. Y. 280, and cases cited.
Munson v. *Dyett*, 56 How. Pr. 333.
Pardee v. *Treat*, 82 N. Y. 385, 388.
Norwood v. *De Hart*, 30 N. J. Eq. 412.
Wise v. *Fuller*, 29 Id. 257, 266.
Arnauld v. *Grigg*, 29 Id. 482.
Bull v. *Titsworth*, 29 Id. 73.
Klapworth v. *Dressler*, 13 Id. 62, 63.
Crowell v. *Currier*, 27 Id. 152.
Osborne v. *Cabell* (Va. 1883), 7 Va. Law J. 352.
Stewart v. *Worden*, 42 Mich. 154, 161.
Constant v. *Matteson*, 22 Ill. 546.
Adams v. *Powers*, 48 Miss. 451.
2 Story's Eq. Juris., § 973.
Farlow v. *Kemp*, 7 Blackf. (Ind.) 504.
Ferris v. *Carson*, 16 Nev. 44.
Cashman v. *Henry*, 55 How. Pr. 234, 239.
Mount v. *Van Ness*, 33 N. J. Eq. 262, 265.

The clause making the grantee assume payment of incumbrances was inserted in the deed by mistake, and was invalid as between the parties to the deed, therefore no rights grew out of such clause in favor of the mortgagee.

Mansur v. *Bartholomew*, Ind., per Elliott, J., 19 Albany L. J., 52.
Mechanics Bk. v. *N. Y. etc., R.*, 13 N. Y., 599, 638.
Donaldson v. *Hall*, 2 Daly, 325, 327.
Dunning v. *Leavitt*, 85 N. Y. 30.
Pardee v. *Treat*, 82 Id. 385, 388.
Hinman v. *Bowen*, 3 Hun, 192.
Deyerman v. *Chamberlin*, 22 Hun, 110.
Albany Sav. Bk. v. *Burdick*, 87 N. Y. 40.
Remsen v. *Beekman*, 25 N. Y. 552, 561.
Kilmer v. *Smith*, 77 N. Y. 226.
Judson v. *Dada*, 79 Id. 373, 379.
Devlin v. *Murphy*, 56 How. Pr. 326.
Fleischauer v. *Doellner*, 58 How. (N. Y.) Pr. 190–91.
Brewer v. *Maurer*, 38 Ohio St. 543, 550.
Benedict v. *Hunt*, 32 Iowa, 27.
Fuller v. *Lemar*, 53 Id., 477.
Gilbert v. *Sanderson*, 56 Id. 349.
Insurance Co. v. *Addick*, 12 Phila. 490.
Wise v. *Fuller*, 29 N. J. Eq. 257, 261.
Stevens' Instit. v. *Sheridan*, 30 N. J. Eq. 23.
Stines v. *Hays*, 36 Id. 364, 369.
Parks v. *Jenks*, 36 Id. 398.
Bull v. *Titsworth*, 29 Id. 73.
Higman v. *Stewart*, 38 Mich. 513 524.
Huebsch v. *Scheel*, 81 Ill. 281, 283–4.

Brandt on Suretyship, § 284.

Cashman v. *Henry*, 55 How. Pr. 234, 239.

Mount v. *Van Ness*, 33 N. J. Eq. 262, 265.

Biddle v. Brizzolara, 12 Pacific Coast L. J. 344, 352

*SEVENTH.

APPELLANT IS NOT ESTOPPED TO DENY THAT HE BECAME LIABLE FOR THE PAYMENT OF THE MORTGAGE DEBT FOR THE FOLLOWING REASONS, VIZ:

I.

Appellee's action against appellant is not upon the mortgage notes, but upon the alleged contract of assumption contained in the deed, and appellant is not liable as the maker or indorser of commercial notes; and appellee could acquire no rights under such contract except subject to equities between appellant and Daggett.

Mansur v. *Bartholomew*, Ind., per ELLIOTT, J., 19 Albany L. J. 52.

Mechanics' Bank v. *N. Y., Etc. R.* 13 N. Y. 599, 638.

Donaldson v. *Hall*, 2 Daly (N. Y.) 325, 327.

Seaman v. *Whitney*, 24 Wend. 260.

Thorp v. *Keokuk*, 48 N. Y. 253, 257, and cases *ante*, *p.* 24-5, 31.

By such contract of assumption with his grantor, the mortgagee did not acquire further security.

See cases *ante p.* 24-5, 28-9; *post*, 46.

II.

The *bill* does not allege that appellant filed the deed for record, or ever made any representation that he had agreed to pay the mortgage debt, and there is no presumption

*See *post* p. 56.

from the record of such deed that it was delivered to or accepted by him with its burden.

Thompson v. *Dearborn*, 107 Ill. 87.
Higman v *Stewart*, 38 Mich. 513, 523.
King v. *Woodbridge*, 34 Vt. 571, and see cases *ante p. 14.* *post p. 91*

No representation was made by appellant to *appellee* that he had agreed to pay the mortgage debt.

Donaldson v. *Hall*, 2 Daly, 325, 327.
Mechanics' Bk. v. *N. Y., etc., R.*, 13 N. Y. 599, 638.
Jackson v. *Brinckerhoff*, 3 Johns. Cas. 100.
Reynolds v. *Lounsbury*, 6 Hill, 534.
Otis v. *Sill*, 8 Barb. 102.
Strong v. *Strickland*, 32 Barb. 284, 289.
Greensburg v. *Sidener*, 40 Ind. 424, 435.
Tuft v. *Hays*, 5 N. H. 453.
Smith v. *Newton*, 38 Ill. 230.
Herman on Estoppel, §§ 246–8.

III.

Appellant did not file the deed for record with the *knowledge* that it contained the assumption clause.

Gibbs v. *Linabury*, 22 Mich. 479, 485, 492.
Freeman v. *Cook*, 2 Exch. 654.
Howard v. *Hudson*, 2 El. & Bl. 1.
Taylor v. *Ely*, 25 Conn. 250, 259.
Kuhl v. *Mayor*, 23 N. J. Eq. 84.
Anderson v. *Lyons*, 11 Allen, 349.
Odlin v. *Gove*, 41 N. H. 465, 473.
Counihan v. *Thompson*, 111 Mass. 270.
Hill v. *Epley*, 31 Pa. St. 331, 334.

Thrall v. *Lathrop*, 30 Vt. 307.
Dorlaque v. *Cress*, 71 Ill. 380.
Chandler v. *White*, 84 Id. 435.
People v. *Brown*, 67 Id. 435, 437.
Flower v. *Ellwood*. 66 Id. 439.
Winslow v. *Cooper*, 104 Id. 235, 239–240.
Greensburg v. *Sidener*, 40 Ind. 424, 435.
Copeland v. *Copeland*, 28 Me. 525, 540.
Boggs v. *Merced Min. Co.*, 14 Cal. 279, 367–8, per FIELD, J.
Martin v *Zellerbach*. 38 Cal. 300, 315.
Brant v. *Va. Coal Co.*, 93 U. S. 326, 335.

The record of the deed did not charge appellant with knowledge of its contents.

Mead v. *Bunn*, 32 N. Y. 275, 276, 278.

Appellant was not guilty of negligence in not discovering the assumption clause.

Elliott v. *Sackett*, U. S. S. C., 2 Sup. Ct. Rep. 375, 381.
Botsford v. *McLean*, 45 Barb. 478.
Albany City Sav. Bk. v. *Burdick*, 87 N. Y. 40.
Kilmer v. *Smith*, 77 N. Y. 226.
Chamberlain v. *Chamberlain*, 3 Lans. 348, 376.
King v. *Woodbridge*, 34 Vt. 571.
Bergen v. *Ebey*, 88 Ill. 269.
Stines v. *Hayes*, 36 N. J. Eq. 364.
Molierie v. *Insurance Co.*, 5 Rawle, 341, 356.
Kelleher v. *Insurance Co.*, 28 Ind. 170, 173–4.

IV.

The *bill* does not allege that appellee was induced to purchase the mortgage notes by the fact that the deed to Drury contained the assumption clause, or did purchase the notes relying upon an apparent liability of appellant for their payment.

See Point II. *ante*, p. 15.

Moran v. *Palmer*, 13 Mich. 367, 372.
Fletcher v. *Holmes*, 25 Ind. 458, 470.
White v. *Morrison*, 11 Ill. 361, 366.
Page v. *Greely*, 75 Id. 400, 406.
Kellogg v. *Moore*, 97 Id. 282, 287.
Tarleton v. *Vietes*, 1 Gilm. (Ill) 470, 474.
Kimball v. *Cook*, 1 Id. 423, 428.
Piatt v. *Vattier*, 9 Pet. 405, 416.

Appellee did not know of any apparent liability of appellant when the notes were assigned to her; and the record of the deed was not constructive notice to her.

See Third Point, *ante* p. 16.

There is no evidence that appellee paid a valuable consideration for the mortgage notes after the conveyance to appellant, and the allegation of such fact in the bill is not admitted by the want of denial in the answer.

Berry v. *Whitney*, 40 Mich. 65, 71.
Brown v. *Pierce*, 7 Wall. 205, 211–12.
Brooks v. *Byam*, 1 Story, 297.
McNeill v. *Magee*, 5 Mason, 244, 270.
Young v. *Grundy*, 6 Cranch, 51.
Rogers v. *Marshall*, 3 McCrary, 76, 93.
DeWolf v. *Long*, 2 Gilm. (Ill.) 679, 682.
Kitchell v. *Burgwin*, 21 Ill. 40, 43–4.

Hopkins v. *Medley*, 97 Ill. 402.
Blaisdell v. *Stevens*, 16 Vt. 179.
Warfield v. *Gambrill*, 1 Gill. & J. 503.
Lun v. *Johnson*, 3 Ired. Eq. 70.
Brockway v. *Coff*, 3 Paige Ch. 539.
Morris v. *Morris*, 5 Mich. 171.
Hardwick v. *Bassett*, 25 Mich. 149.
Gamble v. *Johnson*, 9 Mo. 597
Coleman v. *Lyne*, 4 Rand. (Va.) 454.
Cropper v. *Burton*, 5 Leigh, 426, 432.

ARGUMENT.

I.

*(COMPRISING FIRST FOUR POINTS OF BRIEF.)

The question presented by the pleadings and evidence in this case is one of general jurisprudence (See Brief, first point, ante p. 14), *and is this:* CAN THE APPELLEE (HAYDEN), THE HOLDER OF MORTGAGE NOTES, WHO HAS TAKEN AN ASSIGNMENT OF THE SAME AFTER THE CONVEYANCE OF THE MORTGAGED PREMISES BY A GRANTOR (DAGGETT) NOT PERSONALLY LIABLE FOR THE PAYMENT OF THE MORTGAGE DEBT, ENFORCE PAYMENT OF SUCH NOTES BY THE APPELLANT (DRURY), THE GRANTEE IN SUCH DEED, BECAUSE SUCH DEED CONTAINS A CLAUSE RECITING THAT THE GRANTEE THEREIN HAS AGREED TO PAY SUCH DEBT, SUCH CLAUSE HAVING BEEN INSERTED IN THE DEED BY MISTAKE OF THE SCRIVENER THAT DREW THE DEED, AND WITHOUT THE KNOWLEDGE AND CONTRARY TO THE AGREEMENT AND INTENTION OF THE PARTIES TO THE DEED, AND THE APPELLANT, THE GRANTEE IN THE DEED, HAVING, AS SOON AS HE BECAME AWARE THAT THE DEED CONTAINED SUCH CLAUSE, PROCURED FROM HIS GRANTOR AND RECORDED A WRITTEN RELEASE, UNDER SEAL, OF ALL OBLIGATION TO PAY THE MORTGAGE DEBT BY REASON OF SUCH ASSUMPTION CLAUSE, AND THE APPELLEE, THE HOLDER OF SUCH NOTES, NOT HAVING BEEN INDUCED TO PURCHASE THE NOTES BY ANY APPARENT LIABILITY TO PAY THEM ON THE PART OF APPELLANT, THE GRANTEE IN THE DEED, AND NOT HAVING NOTICE, UNTIL LONG AFTER THE RECORDING OF SUCH RELEASE, OF ANY APPARENT LIABILITY ON THE PART OF APPELLANT TO PAY THE NOTES, OR OF THE CONVEYANCE OF THE MORTGAGED PREMISES TO APPELLANT? *Ante pp. 14, 16, 17.

(A.)

Daggett, appellant's grantor, was not liable for the payment of the mortgage debt. (See Brief, second and sixth points, pp. 14, 24.)

This clearly appears from the testimony of Daggett, and of Whipple and Pratt, who negotiated the trade between William C. Snow and Daggett. (*Printed Record, pp. 76-8, 83, 62-7*). Such testimony is strongly corroborated by the fact that the deed to Daggett contained no assumption clause, so called (*Tillotson* v. *Boyd*, 4 Sandf. p. 516, 522; *Fisk* v. *Tolman*, 124 Mass. 254); and by the admission in the deed executed by Snow (*Printed Record, p. 43*), of the full payment of the purchase money by Dagget to Snow (*Heid* v. *Freeland*, 30 N. J. Eq. 591, 594); and Snow, complainant's witness, testifies that Daggett never agreed to pay the mortgage debt. (*Printed Record, p. 40*). The court below found that Daggett was not personally liable for the payment of such debt. (9 Biss. Rep. 515.)

(B.)

Appellant never agreed to pay the mortgage debt; the clause of assumption was inserted in the deed to appellant by mistake of the scrivener, and without the knowledge of appellant or Daggett; Daggett executed to appellant a release of all obligation under such clause as soon as it was discovered. (*Brief, Fourth Point, p. 17.*)

The evidence, namely, the testimony of appellant and Daggett, the parties to the deed, and of Whipple, who negotiated the trade between such parties and was personally interested with Daggett in the trade, clearly shows that appellant exchanged his farm with Daggett for the *equity of redemption* in these and other mortgaged prem-

ises, and that the mortgage indebtedness formed no part of the purchase price of the premises on the conveyance to appellant, and that it was not the agreement or intention of Daggett or appellant that appellant should assume and agree to pay the mortgage notes held by appellee, and that the above-mentioned clause of assumption was inserted in said deed by mistake of the scrivener who drew the deed for Daggett's attorney, and that neither appellant nor Daggett knew that such clause was in the deed until April, 1877, long after its registry, when appellant's attention was called to the clause by Mr. Larned, the trustee in the first mortgage; and that, at once, on discovery of the clause in the deed, to correct the mistake of the scrivener and effectuate the intention of the parties to the deed at the time of its delivery, Daggett executed to appellant a written release, under seal, of all obligation to pay the mortgage indebtedness (*see Fourth Point, ante p. 17, and the testimony ante p. 9; Printed Record, pp. 49–57, 77–8, 81, 83–5*). Complainant's only witness, Hutchinson, testified simply that he drew the deed according to instructions given him by Willard, Daggett's attorney, but did not remember what the instructions were; that he delivered the deed to Daggett, and did not know and never saw appellant (*Printed Record, pp. 73–5*). The court below found that it was not the intention or agreement of the parties to the deed that appellant should assume payment of the mortgage indebtedness, and that the clause of assumption was inserted in the deed without their knowledge and by mistake of the scrivener (see reasons given by the court for this conclusion, 9 Biss. Rep. p. 514–5). The payment of interest by appellant on the mortgage was in 1876, and before he knew that the

assumption clause was in the deed, and cannot prejudice appellant (*Printed Record, pp. 57–8*).

Elliott v. *Sackett*, U. S. S. C., 2 Supreme Ct. Rep. 375.

King v. *Whitely*, 10 Paige, 465.

Talbert v. *Berkshire Ins. Co.*, 80 Ind. 434, 440–41.

The record of the deed to appellant did not charge him with notice of its contents.

Mead v. *Bunn*, 32 N. Y. 275–6, 278.

That it was competent to show by parol evidence, that the assumption clause was inserted in the deed by mistake, and did not express the agreement of the parties to the deed, is well settled.

Elliott v. *Sackett*, U. S. C. C., 2 Sup. Ct. Rep., 375, 381, and other cases, *ante* p. 18.

Moreover, the deed was not signed by appellant; the evidence shows that it was not accepted by appellant with the knowledge that it contained the assumption clause; and from its record there was no presumption of its acceptance with its burden.

Thompson v. *Dearborn*, 107 Ill. 87.

Higman v. *Stewart*, 38 Mich. 513.

(C.)

Hayden, appellee, was not induced to purchase the mortgage notes by any apparent liability to pay them on the part of appellant; nor did she have notice of any apparent liability of appellant to pay them, or of the conveyance of the mortgaged premises to appellant, until long after the recording of the release from Daggett to appellant

of all apparent obligation under the assumption clause. (Brief, second and third points, pp. 14, 16.)

The bill does not allege that appellee was induced to purchase the notes by any apparent liability of appellant to pay them; or that she had notice of any such apparent liability or of the conveyance by Daggett to appellant before such release; and, therefore, it must be presumed that she did not purchase the notes, relying upon any such apparent liability, and had no notice of any such apparent liability or of the conveyance by Daggett to appellant.

The law presumes that the complainant states his case as strongly as the facts will warrant, and a pleading is to be construed most strongly against the pleader. Every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the *bill*, otherwise the defect will be fatal, for no facts are properly in issue unless charged in the bill. Even if the answer or evidence should disclose a clear title to the relief, the decree cannot stand if any fact essential to plaintiff's right to the relief is not distinctly charged in the bill.

Battle v. *Insurance Co.*, 10 Blatchf. 317, and cases cited ante, p. 15, second point.
Moran v. *Palmer*, 13 Mich. 367, 372.
Page v. *Greely*, 75 Ill. 400, 406.

The registry act of Illinois is:

> All deeds, mortgages and other instruments in writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice, etc. (R. S. of Ill, 1874, chap. 30, sec. 30.)

And the registry of the deed to appellant was not constructive notice to appellee of the clause of assumption in such deed; for, 1st appellee claimed a lien on the premises, not through Daggett, appellant's grantor, but through a

mortgage made by Solomon Snow, and recorded in July, 1875, while the deed to appellant was not recorded until January, 1876; 2d, such clause was not an essential part of the deed as a conveyance.

The registry of a deed is constructive notice only of its essential part as a conveyance and of covenants running with the land, and binding on the assignees of the grantee. And "a contract to assume an incumbrance on "land purchased is not one of the essential parts of a deed "of conveyance—indeed, such a contract is a stranger to "a deed;" it is a merely personal covenant of the grantee and binding on him alone, and the recording of a deed containing such a contract is not constructive notice to any person of the presence of such contract in the deed.

Thompson v. *Dearborn*, 107 Ill., 87.
Judson v. *Dada*, 79 N. Y., 373.
Osborne v. *Cabell* (Va.), 7 Va. Law J. 352.

The sole object of the registry law is to give to purchasers and mortgagees notice of conveyances and incumbrances executed by *the grantor under whom they claim, and recorded before the deeds and mortgages under which they claim.* The registry law has no application to those who already have title or incumbrance of record; it was not designed to affect or change rights already vested and secured by a deed or mortgage, but simply to protect a purchaser or incumbrancer against a prior unrecorded conveyance or incumbrance. The purchaser of a mortgage is not interested to know who becomes the owner of the premises after a record has been made of the mortgage he is about to purchase. No transfer of the mortgaged premises after the mortgage was recorded could displace, impair or affect the lien created thereby. An assignee of

a mortgage acquires all rights of the original mortgagee, not as new rights, but as transferree of those already existing or apparently existing at the time of the record of the mortgage.

Mead v. *Parker*, 29 Hun, 62, 66.

Miller v. *Larned*, 103 Ill. 562, 567, and cases *ante*, page 17.

II.

*(SECOND POINT OF BRIEF.)

THE BILL DID NOT ALLEGE THE ACCEPTANCE OF THE DEED CONTAINING THE ASSUMPTION CLAUSE BY APPELLANT, OR ITS DELIVERY TO HIM, OR THAT HE FILED THE SAME FOR RECORD (*See Printed Record, page 3*), AND THEREFORE THE DECREE CANNOT STAND.

For every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the *bill*. The evidence (*See supra, page*) shows that appellant did not agree to pay the mortgage indebtedness, and such indebtedness formed no part of the purchase price of the premises on the conveyance to him. The decree is grounded wholly on the presence in the deed made by Daggett of the clause: "*Both of which said incumbrances the party of the second part herein assumes and agrees to pay;*" and there is no presumption from the record of such deed that appellant accepted it with its burden.

Thompson v. *Dearborn*, 107 Ill. 87.

Higman v. *Stewart*, 38 Mich. 513.

III.

†(FIFTH POINT OF BRIEF.)

EVEN IF THE CLAUSE, "BOTH OF WHICH SAID INCUMBRANCES THE PARTY OF THE SECOND PART HEREIN

—— **Ante*, p. 14. †*Ante*, 18.

ASSUMES AND AGREES TO PAY," HAD BECOME BINDING ON APPELLANT AT THE TIME THE DEED WAS MADE, APPELLEE COULD NOT HAVE MAINTAINED AN ACTION AT LAW AGAINST HIM, ACCORDING TO THE PRACTICE OF ANY COURT, FOR THE FOLLOWING REASONS:

(A.)

There was no privity of contract between appellant and appellee, and the consideration for the promise did not move from the latter.

This is the doctrine of the earliest and latest decisions, English and American, and the only doctrine sustained by principle

Hicks v. *McGarry*, 38 Mich. 667.
Meech v. *Ensign*, 49 Conn. 191.
Mellen v. *Whipple*, 1 Gray, 317.
Exchange Bank v *Rice*, 107 Mass. 37.
Prentice v. *Brimhall*, 123 Id. 291.
Osborne v. *Cabell*, (Va) 7 Va Law J. 352.
Crowell v. *Currier*, 27 N. J. Eq. 152.
Crowell v. *Hospital*, 27 Id. 650.
Youngs v. *Trustees*, 31 Id. 290, 299.
Page v. *Becker*, 31 Mo. 467.
Manny v. *Frazier*, 27 Id. 419.
Owings v. *Owings*, 1 Harr. & G. (Md.) 484.
Lockwood v. *Benedict*, 3 Edw. (N. Y.) Ch. *472.
King v. *Whitely*, 10 Paige, 465.
Tweddle v. *Atkinson*, 1 Best & S. 393.
Cragin v. *Lovell*, U. S. S. C., 3 Sup. Ct. Rep. 132, 135, and other cases, *ante. p.* 19–20.
Wharton on Cont. §§ 507, 784–7.
Hally Hewtown, 17 H. 244,
Biddle, Brizzolara, 12 Brief, Cont. Ky. 344

Inconvenience of allowing mortgagee to sue.

On a consideration moving from his grantor the grantee promises to him that he will pay the mortgage. The grantor has the legal and equitable interest in the promise. It follows that he alone can enforce it, and immediately upon default, without showing that he has been damnified, proceed against the purchaser upon his agreement and recover the full amount of the mortgage debt. If the mortgagee has that right by force of the contract, then two persons wholly independent of each other have an equal right, and both may sue, and a suit by one will not abate or bar a suit by the other, and a discharge by one for cause short of fulfilment will not discharge the contract. Thus the promisor may be harassed with two suits at the same time on the same contract, and if he would compromise with the promisee he must obtain the consent of a stranger.

Tinkler v. *Swaynie*, 71 Ind. 562, 569.
Meech v. *Ensign*, 49 Conn. 191.
Foster v. *Atwater*, 42 Id. 244.
Locke v. *Homer*, 131 Mass. 93.
Williams v. *Fowle*, 132 Id. 385.
Sparkman v. *Gove*, 44 N. J. L. 252.
Ham v. *Hill*, 29 Mo. 275, 278.
Stout v. *Folger*, 34 Iowa, 71, 74–6.
Rawson v. *Copeland*, 2 Sandf. Ch. 251.
Mellen v. Whipple, 1 Gray 317

Cases holding that the plaintiff has a right to maintain an action against the defendant upon a promise made to a third person from whom the consideration moved, rest upon *dicta* and decisions of very questionable authority. The recent decisions have tended to uphold the rule that the right of action lies in him alone from whom the considera-

tion moved and to whom the promise was made, and to narrow the exceptions to it.

Storrs v. *Flint*, 46 Superior (N. Y.) Ct. 498, 521.

Pardee v. *Treat*, 82 N. Y. 385, 392–3.

Vrooman v. *Turner*, 69 N. Y. 280, 284, 285.

Ætna Nat. Bk. v. *Fourth Nat. Bk.*, 46 Id. 82, 90.

Barlow v. *Myers*, 46 Id. 41, 46.

Mellen v. *Whipple*, 1 Gray, 317. See ante p. 22

Doze v. *Clark*, 7 Id. 198, 201.

Carr v. *Nat. Security Bk.*, 107 Mass., 45, 47.

Exchange Bk. v. *Rice*, 107 Id. 37.

Field v. Crawford, 6 Gray 116
(B.) Hall v. Hunton, 17 Vt. 244

The evidence shows that appellant exchanged his farm for the equity of redemption in certain mortgaged premises, and that no part of the purchase-price of the premises in question was retained by appellant; and the deed does not recite that the mortgage debt formed any part of the purchase-price; and, therefore, appellee could not maintain an action at law against appellant, according to

Brewer v. *Maurer*, 38 Ohio St. 543, 549.

Merriam v. *Moore*, 90 Penn. St. 78.

Dean, use, etc., v. *Walker*, 107 Ill. 540, and cases *ante*, p. 20–21.

And according to these cases, no trust is created for the security of the mortgage debt.

Brewer v. *Maurer*, 38 Ohio St. 543, 554.

Mount v. *Van Ness*, 33 N. J. Eq. 262, 265.

Tweddell v. *Tweddell*, 2 Bro. C. C. *101, *108, *152, *154.

Barham v. *Thanet*, 3 Myl. & K. 607, 624.

Riddle v. Brizzolara, 12 Pac. Coast L. J. 344

(C.)

No action at law could be maintained by appellee against appellant on the theory that the clause of assumption was inserted in the deed for the benefit of appellee, for there was nothing in the relationship of the parties, or the nature of the agreement, to indicate that the *object* of the contract was to confer a benefit upon appellee.

See cases *ante*, p. 22-3

Again: The appellee could not maintain an action against appellant on the theory of *Lawrence* v. *Fox* (20 N. Y. 268, 269-270), for appellant's grantor, Daggett, was not liable for the payment for the mortgage debt.

Vrooman v. *Turner*, 69 N. Y., 280.

Farlow v. *Kemp*, 7 Blackf. (Ind.) 504, and cases *ante*, p. 23-4; *post*, p. 51.

IV.

*(SIXTH POINT OF BRIEF.)

THE RIGHTS OF A MORTGAGEE TO THE BENEFIT OF THE AGREEMENT OF THE PURCHASER OF THE MORTGAGED PREMISES, WITH HIS VENDOR, TO PAY THE MORTGAGE DEBT, ARE PURELY DERIVATIVE, AND TO BE WROUGHT OUT THROUGH THE RIGHTS OF SUCH VENDOR AS THEY EXIST AT THE TIME THE MORTGAGEE SEEKS TO AVAIL HIMSELF OF SUCH AGREEMENT; AND THE MORTGAGEE IS NOT ENTITLED TO AVAIL HIMSELF OF THE BENEFIT OF SUCH AGREEMENT, UNLESS SUCH VENDOR IS LIABLE TO HIM FOR THE PAYMENT OF THE MORTGAGE DEBT. THEREFORE THE DECREE AGAINST APPELLANT IS ERRONEOUS, FOR NOT ONLY WAS APPELLANT'S GRANTOR, DAGGETT, NOT LIABLE FOR THE PAYMENT OF SUCH DEBT (*see ante*, p. 38), BUT HE HAD RELEASED APPELLANT FROM ALL

Ante, p. 24.

OBLIGATION TO PAY SUCH DEBT BEFORE APPELLEE FILED HER BILL, AND EVEN BEFORE SHE KNEW OF THE ALLEGED AGREEMENT TO PAY SUCH DEBT (*see ante, p. 37*), AND, MOREOVER, THE ASSUMPTION CLAUSE WAS INSERTED IN THE DEED BY MISTAKE. (*See ante, p. 17*).

There was no trust for the security of the mortgage debt. (ante p. 24-5, 28-9, 46)

The recital in the deed to appellant is simply: "Both of which said incumbrances the grantee herein assumes and agrees to pay." If we suppose appellant estopped to deny that this clause was originally binding on him, yet there was no recital contrary to the fact that the mortgage debt formed part of the purchase-price of the premises, and nothing to raise the presumption that any part of the purchase-price was left in the hands of appellant for the payment of the mortgage debt. By such an agreement there is no trust created for the better securing of the mortgage debt.

Youngs v. *Trustees*, 31 N. J. Eq. 290, 299.
Marsh v. *Pike*, 1 Sandf. (N. Y.) Ch. 210.
Prentice v. *Brimhall*, 123 Mass. 291.
Fisk v. *Tolman*, 124 Id. 254.
Nebraska Nat. Bk. v. *Nebraska City*, 164 Fed. Rep. 763, 766, per McCrary, J.
Meech v. *Ensign*, 49 Conn. 191.
Brandt on Suretyship, secs. 284-5.
Mount v. *Van Ness*, 33 N. J. Eq. 262, 265.
Riddel v. Rizzolara, 12 Pac. Coast L. J. 344

There was no fixed right vested in the appellee, by reason of the clause in the deed, at the time of the release of appellant by Daggett, even if we suppose appellant estopped to deny that the clause in the deed was once binding on him.

The agreement of the purchaser of mortgaged premises with his grantor to pay the mortgage debt, is not a contract with the mortgagee, nor for his benefit, and the right of the mortgagee to a decree against such purchaser for such debt does not result from any fixed or vested right of the mortgagee, either from the purchaser's acceptance of a conveyance of such premises, or from his obligation, as between him and his grantor, to pay such debt, but is usually placed on the doctrine of courts of equity that a *creditor* may have the benefit of all collateral obligations, which one standing in the relation of a surety holds for his indemnity, and may, by a mere rule of procedure, proceed directly against such purchaser, *to avoid circuity and multiplicity of actions*, and save the purchaser's vendor from being harassed for the payment of the debt, and then driven to seek relief over against his grantee, upon whom the liability must ultimately fall. A court of equity, having all the parties before it, can do complete equity. The mortgagee can only be subrogated to the rights of his *debtor;* his right is simply a right of substitution, subject, however, to all the equities between the purchaser and his grantor.

Youngs v. *Trustees*, 31 N. J. Eq. 290, 299.
Crowell v. *Hospital*, 27 Id. 650, 656.
Coffin v. *Adams*, 131 Mass. 131, 136–7.
King v. *Whitely*, 10 Paige, 467.
Halsey v. *Reed*, 9 Id. 445.
Hicks v. *McGarry*, 38 Mich. 667.
Osborne v. *Cabell*, (Va.) 7 Va. Law J. 352.
Brandt on Suretyship, secs. 284–5, and cases
ante p. 24–6, 46, 29.
Biddel v. Brizzolara, 12 Pacif. Coast L.J. 344

In Illinois, Indiana, Pennsylvania, Ohio, New York, and other States, when a mortgagee is allowed to enforce payment of the mortgage debt by the purchaser of the premises, who has agreed with his vendor to pay the same, the remedy is really given upon the same equitable principle whereby the mortgagee is simply subrogated to the existing rights of his debtor, but is allowed to enforce such rights in an action of assumpsit, *to avoid circuity and multiplicity of actions.*

Brewer v. *Maurer*, 38 Ohio St. 543, 549, 554.
Taylor v. *Taylor*, 20 Ill. 650, 653.
Walden v. *Karr*, 88 Id. 49, 52.
Prather v. *Vineyard*, 4 Gilm. (Ill.) 40, 44, 48.
Davis v. *Halloway*, 30 Ind. 112, 114.
Devol v. *McIntosh*, 23 Id. 529.
Miller v. *Billingsly*, 41 Id. 489, 491.
Sanderson v. *Lamberton*, 6 Binn. (Pa.) 129.
Deyermand v. *Chamberlin*, 22 Hun, 110.
Pardee v. *Treat*, 82 N. Y. 385, 388–9.
Dunning v. *Leavitt*, 85 Id 30, and cases *ante* p. 46, 26, 29; *post*, p. 51.
Cashman v. *Henry*, 55 How. Pr. 234, 239
Biddel v. Brizzalara 12 Pacific Coast L.J. 344, 382

We have seen that, even supposing the clause in the deed was once binding on appellant, his liability was simply *ex contractu*, for no fund was left in his hands for the payment of the mortgage. Therefore, appellee could maintain no action at law against him, except upon the theory of those cases which hold that, in procuring the promise of his vendee, the grantor assumed to act as the agent of the mortgagee, and that the mortgagee may, *if he choose*, ratify and confirm the assumed agency. But those cases hold that the promise is to be

deemed made to the mortgagee *only from the time he elects to adopt the agency*, and so signifies to the vendee; and until the creditor *elects* to avail himself of the promise and communicates such fact to the vendee, the promise is a mere proposition to him. and it cannot be known that he will accept it. The law will not presume an acceptance, and the vendee can be garnished by a creditor of his vendor at any time before the actual acceptance of the promise by the mortgagee and notification of such fact by him to the vendee.

Hartman v. *Olivera*, 54 Cal. 61.
Ridge v. *Olmsted*, 73 Mo. 578.
Talburt v. *Berkshire Ins. Co.*, 80 Ind. 434, 441–2.
Kelley v. *Roberts*, 41 N. Y. 432.
Knickerbocker Ins. Co. v. *Nelson*, 78 N. Y. 137, 152–3.
And see cases *infra*, *p. 53*.

In *adopting* the assumed agency of the promisee, the plaintiff elects to look to the promisor alone for the payment of his demand, and thereby *discharges his original debtor*, a novation being worked.

Sanderson v. *Lamberton*, 6 Binn. (Pa.) 129.
Commercial Bk. v. *Woods*, 7 W. & S. (Pa.) 89.
Urquhart v. *Brayton*, 12 R. I. 169, 172.
Bohannon v. *Pope*, 42 Me. 93.
Butterfield v. *Hartshorne*, 7 N. H. 345.
Warren v. *Batchelder*, 15 Id. 129, 136; 16 Id. 580.
Rumery v. *McCullough*, 54 Wis. 565.
Bowen v. *Kurtz*, 37 Iowa, 239.
Gibson v. *Minet*, 9 Moore, 31.

Even if the clause in deed had been originally binding on appellant, he was under no obligation to pay the mortgage debt of which appellee could avail herself when she filed her bill; for the evidence shows that Daggett released appellant of all obligation under such clause before appellee filed her bill, or even knew of any apparent liability on appellant under such clause.

As we have seen, under the clause in the deed there was no trust created for the security of the mortgage debt, nor could it be inferred that any fund was left in the appellant's hands for the payment of such debt, and it is well settled that the purchaser may release and discharge the purchaser from his agreement to pay the mortgage debt at any time before action brought by the mortgagee.

Youngs v. *Trustees*, 31 N. J. Eq. 290, 299.
Crowell v. *Hospital*, 27 Id. 650.
O'Neil v. *Clarke*, 33 Id. 444.
Stephen v. *Casbacker*, 8 Hun, 116.
Whiting v. *Gearty*, 14 Id. 498.
Simson v. *Brown*, 68 N. Y. 355.
Knickerbocker Ins. Co. v. *Nelson*, 78 Id. 137, 152–3.
Devlin v. *Murphy*, 5 Abb. New Cases, 242.
Gilbert v. *Sanderson*, 56 Iowa, 349.
Brewer v. *Maurer*, 38 Ohio St. 543, 554.
Mansur v. *Bartholomew*, Ind., per Elliot, J., 19 Albany, L. J. 52.
Miller v. *Billingsly*, 41 Ind. 489, 491.
Brandt on Suretyship, § 285, and cases *ante* p. 24–6, 46, 29.

Riddel v. Brizzolara 12 Pacif. Coast L. J. 344

We have seen, also, that where it is held that the creditor may maintain an action at law, according to the doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268, it is held that

until the creditor *elects* to avail himself of the promise, it is a mere proposition to him, and it cannot be known that he will accept it ; the law will not presume an acceptance. And it follows that, if the contract be rescinded and canceled by the parties to it before the promisor has notice that the creditor will accept the benefit or terms of the contract, such creditor cannot enforce the contract.

Talburt v. *Berkshire Ins. Co.*, 80 Ind. 434, 441–2.

Knickerbocker Ins. Co. v. *Nelson*, 78 N. Y. 137, 152–3.

Davis v. *Callaway*, 30 Ind. 112.

Trimble v. *Strother*, 25 Ohio St. 378.

Brewer v. *Maurer*, 38 Id. 543, 554.

Jones v. *Higgins*, 80 Ky. 409.

Wyman v. *Smith*, 2 Sandf. 331.

Seaman v. *Whitney*, 24 Wend. 260.

Kelley v. *Roberts*, 40 N. Y. 432.

Winkley v. *Foy*, 33 N. H., 171, and other cases *ante* p. 27–9.

Biddel v. Brizzolara, 12 Freiflood & J. 344, 352

And it is well settled that where money is sent to one person to be paid by him to another as a mere voluntary gift or donation, founded on no precedent consideration, debt or duty, the authority may be revoked at any time before the money is actually paid over.

1 Addison Cont. (Morgan's ed.), § 34.

2 Story's Eq. § 1196, 1036 b.

Swarts v. *Earls*, 53 Ill. 237.

Appellee was not entitled to avail herself of the benefit of any alleged promise made by appellant to Daggett, for Daggett was not liable for the payment of the mortgage debt.

The mortgagee can only be subrogated to the rights of his *debtor*, and, therefore, if the purchaser's vendor is not personally liable for the payment of the mortgage debt at the time of action brought, no decree can be rendered against the purchaser in favor of the mortgagee; there is no chance for an equitable subrogation in such a case.

King v. *Whitely*, 10 Paige, 465.
Vrooman v. *Turner*, 69 N. Y. 280.
Crowell v. *Currier*, 27 N. J. Eq. 152.
Osborne v. *Cabell* (Va.), 7 Va. Law J. 352, and other cases *ante* pp. 23-6, 30-2, 49, 51.

And the courts which permit the plaintiff to sue at law upon a contract to which he was not a party, have always held that a mere volunteer cannot claim the benefit of a contract between other parties, and that there must be some obligation or duty owing from the promisee to the plaintiff to give him a legal or equitable claim to the benefit of the promise.

Vrooman v. *Turner*, 69 N. Y. 280, and cases there cited.
Farlow v. *Kemp*, 7 Blackf (Ind.) 504.
Ferris v. *Carson*, 16 Nev. 44.
Dutton v. *Poole*, 1 Vent. 318. 2 2 Kern 110
2 Story's Eq. § 973, and cases cited *ante* p. 23, 30, 51. Cashman v. Henry, 55 How. Pr. 234, 239
Biddle v. Brizzolara, 12 Phila. Rep. 339, 344, 352

In the present case appellant simply exchanged his farm for the *equity of redemption* in the premises, as appellee alleged in her bill, and even according to the deed it did not appear that any part of the purchase price was left in appellant's hands, and the case does not come within the doctrine as laid down in

Brewer v. *Maurer*, 38 Ohio St. 543, 549.
Merriman v. *Moore*, 90 Pa. St. 78.
Dean, use, etc., v. *Walker*, 107 Ill. 540.
See *Mount* v. *Van Ness*, 33 N. J. Eq. 262, 265.
Tweddell v. *Tweddell*, 2 Bro. C. C. *101, *108, *152, *154.
Barham v. *Thanet*, 3 Myl. & K. 607, 624.

The assumption clause was inserted in the deed by mistake of the scrivener, and without the knowledge and contrary to the agreement of appellant and his grantor, as we have shown, and therefore appellant never became liable for the payment of the mortgage debt.

The rights of a plaintiff claiming the benefit of a promise by the defendant to a third person from whom the consideration, if any, moved, are purely derivative, and to be wrought out through the rights and obligations resting in the promisee, whether he be permitted to maintain an action at law or in equity only. There can be no sound reason to hold the defendant to such promise, when it was procured by fraud or mistake, any more than to one made directly to the plaintiff when obtained by the same means. The right of such plaintiff is simply the right of substitution in place of the promisee, subject to all equities between the defendant and his promisee. The clause in the deed to appellant being invalid as between him and his grantor, no rights grew out of it in favor of appellee.

Dunning v. *Leavitt*, 85 N. Y. 30.
Pardee v. *Treat*, 82 Id. 385, 388.
Brewer v. *Maurer*, 38 Ohio St. 543, 549, 550.
Benedict v. *Hunt*, 32 Iowa, 27. 22 Kan 110
Fuller v. *Lamar*, 53 Id. 477.
Cashman v. Henry, 55 How. Pr. 234 239
Biddle v. Bizzaleta, 12 Daif. Cast 8 J. 344 352
(over)

Ins. Co. v. *Addick*, 12 Phila. 490.

Stevens' Institute v. *Sheridan*, 29 N. J. Eq. 257, 261.

Higman v. *Stewart*, 38 Mich. 513, and cases *ante* p. 24–6, 31.

V.

*(SEVENTH POINT OF BRIEF.)

APPELLANT IS NOT ESTOPPED TO DENY THAT HE BECAME LIABLE FOR THE PAYMENT OF THE MORTGAGE DEBT.

Appellee's action against appellant is not upon the mortgage notes, but upon the alleged contract of assumption contained in the deed. The grantee who takes a deed of mortgaged premises containing an assumption clause is bound, not upon the notes, but upon his contract, and because he contracted to be bound. The notes are but evidence of the debt agreed to be paid—the measure of damages—while the contract of assumption is the evidence of the agreement to pay and affords the measure—and the only measure—of right and liability. The breach in failure to pay the notes is a breach not of contract evidenced by the note, but a breach of the alleged contract in the deed. Appellant's name does not appear upon the notes as maker or endorser, and the peculiar doctrines surrounding commercial notes do not apply to the contract of assumption contained in the deed. Accepting a deed with such a clause is not the same as executing or indorsing a note negotiable by the law merchant. The utmost that can be said is, that he promises in a distinct and different contract to pay the note, and it is not just to hold him to the same liability as the maker or indorser of a commercial note, for his contract is not in that form, nor is there anything in it inviting any one to buy the right to enforce it

— *Ante*, p. 32.

free from just defenses. As has been shown (*ante* p. 48, 46), by such a contract of assumption, there is created no trust or security for the mortgage debt, and to say that he is estopped by receiving a deed reciting that he agreed to pay the notes would subvert the settled maxim that the assignee or purchaser of a non-negotiable instrument takes subject to all the equities between the original parties, and also the maxim belonging to estoppel itself, that an admission or representation is no estoppel in favor of a stranger, to whom it was not made, and whose conduct it was not intended or expected to influence. The law, as declared in *Carpenter* v. *Longam*, 16 Wall, 271, and other cases cited in the opinion of the court below (9 Bissell's Rep. 514) does not apply to the facts of this case. In those cases the action was by the indorsee of a negotiable promissory note against the maker of the note and mortgage, and the mortgage was given to secure the payment of the note and give it value and currency in the market; and in the case of a promissory note the maker is bound to pay the obligation in the hands of an innocent party, not upon any theory of estoppel, but upon principles peculiar to that species of security. Here, appellee secures her rights, if she has any, through Daggett, and by virtue of the alleged contract with him, and not because appellant signed or indorsed a negotiable note or mortgage to secure one. True, the note which the deed recites that appellant agreed to pay was negotiable, but the contract alleged to bind appellant was the one written in the deed, and appellee can recover against appellant, not upon the note, but, if at all, only on the contract of assumption which evidences the alleged agreement of appellant and affords the measure—and the only measure—of right and liability. There is another reason why *Carpenter* v. *Longam*, and

the other cases cited by the court below, in its opinion, cannot be deemed applicable to such a case as the present. Appellant is not seeking to prevent a foreclosure of the mortgage, nor is he seeking to defeat an action on the notes; there is no attempt to question the validity of the mortgage, or impair the rights which it creates; there is no effort to prevent appellee from getting the full benefit of the mortgage by which the note was secured. The notes are simply the evidence of the debt to be paid, while the contract of assumption is the evidence of the alleged agreement to pay. It would be a wide stretch of judicial power to declare that one who agrees to pay a negotiable note becomes liable in the same manner as if he were a party to the note as maker or indorser.

Mansur v. *Bartholomew*, Ind., per ELLIOTT, J., 19 Albany L. J 52.

Mechanics' Bk. v. *N. Y. etc., R.*, 13 N. Y. 599, 638.

Donaldson v. *Hall*, 2 Daly, 325, 327.

Seaman v. *Whitney*, 24 Wend. 260.

Thorp v. *Keokuk*, 48 N. Y. 253, 257.

Again: There are present in this case none of the elements essential to maintain the claim in favor of appellee that appellant is estopped to deny that he agreed with Daggett to pay the mortgage debt:

(A.)

When the deed was filed for record appellant did not *know* that it contained an assumption clause; he was not guilty of negligence in not discovering the presence of the clause in the deed, for he had a right to suppose that the deed was drawn by Daggett according to agreement (*Elliott* v. *Sackett*, *Botsford* v. *McLean*, and other cases, *ante* p. 34); and the record of the deed did not charge

him with knowledge of its contents, for "it is not "the purpose of the recording acts to charge the *imme-* "*diate* parties with constructive notice of the precise con- "tents of the instruments they execute." (*Meade* v. *Bunn*, *ante* p. 34.) Knowledge of the truth on the part of the party claimed to be estopped is essential to an estoppel. (See *ante* p. 33.)

(B.)

No representation was made to *appellee* that appellant had agreed to pay the mortgage debt; it was not intended or expected to influence his conduct, and no estoppel can arise in the favor of a stranger (See cases *ante* p. 33.)

(C.)

There is no admission in the pleadings, nor any evidence, that appellee paid a valuable consideration for the mortgage notes, or put herself in a worse situation, after the conveyance to appellant; and, therefore, appellant cannot be estopped to show the truth (See cases *ante* p. 35.) The suit is not on the notes.

(D.)

The bill does not allege, nor does the evidence show, that appellee was induced to purchase the notes in consequence of any apparent liability of appellant for their payment; and therefore there is no estoppel.

The deed to appellant was not constructive notice to appellee, and there is no evidence that she knew of any such apparent liability of appellant, when the notes were assigned to her.

See *ante* pp. 15, 16, 40–3.

(E.)

All facts essential to the plaintiff's right to relief must be stated in the bill of complaint, and the bill in this case

does not allege that appellant filed for record the deed containing the assumption clause, or even made any representation that he had agreed to pay the mortgage debt. There is no presumption from the record of the deed that it was delivered to or accepted by appellant with its burden.

Thompson v. *Dearborn*, 107 Ill. 87.
Higman v. *Stewart*, 38 Mich. 513.
And see *ante pp. 15, 16.*
Moran v. *Palmer*, 13 Mich. 367, 372.
Page v. *Greely*, 75 Ill. 400, 406.

VI.

CONCLUSION.

Our apology for the length of our brief and argument and the citation of the vast array of decided cases, is the great number of questions involved in this case, the want of adjudication on such questions in this court, the diverse grounds upon which the State courts have allowed a mortgagee to enforce payment of his mortgage by a purchaser who has agreed with his vendor to pay such mortgage, and the apparent necessity of showing, as we think we have shown, that according to none of the theories prevailing in the courts of the different States, ought the decree in this case to stand.

We submit that the decree in this case, instead of preventing a fraud, works one, and ought to be reversed, and appellee's bill of complaint dismissed for want of equity.

Respectfully,

J. M. H. BURGETT,
ABNER SMITH,
U. P. SMITH,
Counsel for Appellant.

111-229

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1883.

WILLIAM DRURY,
Appellant,

vs.

ANNIE E. HAYDEN,
Appellee.

APPEAL FROM CIRCUIT COURT OF U.S. NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLEE.

ROSWELL B. BACON,
WILLIAM R. PAGE,
For Appellee.

FERGUS PRINTING COMPANY, CHICAGO.

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APPEAL FROM CIRCUIT COURT OF U.S. NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR APPELLEE.

THIS is an appeal from a deficiency decree rendered in favor of the appellee and against the appellant for the sum of $15,194.21, in a bill to foreclose a mortgage. At the time of the filing of the bill, the appellant was the owner of the mortgaged premises, as a remote grantee of the original mortgagor, and the said decree is based upon a certain assumption clause contained in the deed to said appellant, in and by which he assumed and agreed to pay the mortgage indebtedness sought to be foreclosed.

In the view ake of this case, no statement of the facts or review of the evidence, other than as the same are presented in appellant's brief is necessary to a proper consideration of the merits of the same.

BRIEF.

FIRST.

The effect, construction, and interpretation of the assumption clause in the deed from Daggett to Drury, the appellant is governed and controlled by the law of the State of Illinois, where it was made and was to be performed, and such law, whether embraced in the statutes of said State or in the decisions of its courts, is binding upon this court.

McGoon *v.* Scales, 9 Wall, 27.
Brine *v.* Insurance Co., 96 U. S., 627.
Jackson *v.* Chew, 12 Wheaton, 162.
Orvis *v.* Powell, 98 U. S., 176.

SECOND.

The appellant became liable to pay the mortgage indebtedness by virtue of the assumption clause contained in the deed from his grantor, Daggett, to him and accepted by him, and that such liability inured to the benefit of the appellee as the owner of the mortgage indebtedness; and it is immaterial whether his grantor, Daggett, was personally liable for the mortgage debt or not.

Hand *v.* Kennedy, 83 N.Y., 149.
Ross *v.* Kenison, 38 Iowa, 396.
Comstock *v.* Hitt, 37 Ill., 542.
Fitzgerald *v.* Barker, 70 Mo., 685.
Heim *v.* Vogel, 69 Mo., 529.

Bassett *v.* Hughes, 43 Wis., 319.
Urquhart *v.* Brayton, 12 R. I., 169.
Merriam *v.* Moore, 90 Pa. St., 78.
Brewer *v.* Maurer, 38 Ohio St., 543.
Rogers *et al. v.* Herron *et al.*, 92 Ill., 583.
Dean, use, etc. *v.* Walker, 107 Ill., 540.
Twichel *v.* Mears, 8th Bissell, 211.
Flagg *v.* Geltmacher, 98 Ill., 293.
Jones on Mtgs., 3d Edition, § 758.

THIRD.

The pretended release from Daggett to appellant (shown on page 81, printed record) was inoperative to divest appellee's rights as a bona-fide purchaser for value, and before maturity and without notice of the mortgage notes, while said assumption clause stood upon the record unreleased.

Campbell *v.* Smith, 71 N.Y., 26.
Douglass *v.* Wells, 18 Hun. (N.Y.), 88.
Judson *v.* Dada, 79 N. Y., 373.
Freeman's Nat. Bank *v.* Savery, 127 Mass., 75.
Coolidge *v.* Smith, 129 Mass., 554.
Murhlige *v.* Fiske, 131 Mass., 110.
Rogers *v.* Goswell, 58 Mo., 589.
Crawford *v.* Edwards, 33 Mich., 354.
Miller *v.* Thompson, 34 Mich., 10.
Bassett *v.* Hughes, 43 Wis., 319.
Betts Trustee etc. *v.* Drew *et al.*, U. S. Cir. Ct., Northern Dist. of Ill., *Chi. Legal News*, Nov. 8, 1879.
Jones on Mortgages, 3d Ed., §§ 763 and 764.
Parkinson *v.* Sherman, 74 N. Y., 88.
Swift *v.* Smith, 102 U. S., 442—449.

FOURTH.

The alleged mistake of the Scrivener who drew the deed can not be set up by the appellant as against the appellee, a bona-fide purchaser for value and without notice.

Sickman *v.* Wood, 69 Ill., 329.
Emery *v.* Mohler, 69 Ill., 221.
Bowen *v.* Galloway, 98 Ill., 41—46.
Kerr on Fraud and Mistake, page 346.
Story's Eq. Jur., § 165.
New Orleans etc. Co. *v.* Montgomery, 95 U.S., 16.

FIFTH.

The citizenship of the parties gave the court jurisdiction of both the parties and the subject matter, and it was competent for it to grant final relief and under the 92d rule in equity of the U. S. courts to render a personal decree against the appellant for a deficiency, in accordance with the prayer of the bill. The decree is sustained by the law and evidence in this case and should be affirmed.

Betts' Trustee etc. *v.* Drew *et al.*, U. S. Cir. Ct., Nor. Dist. Ill., *Chi. Legal News*, Nov. 8, 1879.

ARGUMENT.

I.

FIRST POINT OF BRIEF.

(See page 2.)

The assumption clause in question is in the following words and figures, to-wit:

(See page 79, printed record.)

"Subject to a certain trust-deed executed by Solomon Snow and Elizabeth L., his wife, to E. C. Larned, trustee, to secure payment of twenty-eight thousand dollars ($28,000), executed July 28th, 1875; due five years from date, with interest at ten per cent per annum, payable semi-annually. Also subject to another trust-deed, executed by said Solomon Snow and wife to R. B. Bacon to secure the payment of twelve thousand dollars ($12,000), dated July 28th, 1875; due two and three years from date, with interest at eight per cent per annum, payable semi-annually; both of which said encumbrances the party of the second part herein assumes and agrees to pay."

It is universally conceded that an assumption clause in a deed like the one in question is an express covenant of such deed on the part of the grantee therein. That such grantee is bound by it as effectually as if he himself had signed the deed.

Crawford *v.* Edwards, 33 Mich., 354.
Thorp *v.* The Keokuk Coal Co., 48 N.Y., 255.
Jones on Mortgages, 3d Ed., § 752.
Dean, use, etc. *v.* Walker, 107 Ill., 540.

"It is a principle too firmly established to admit of dispute at this day that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyances."

McGoon *v.* Scales, 9 Wall, 27.

Where any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied in this court.

Jackson *v.* Chew, 12 Wheaton, 162.

Orvis *v.* Powell, 98 U. S., 176.
Brine *v.* Insurance Co., 96 U. S., 627.

Although the principal and primary duty imposed by such a covenant, in a deed, may be personal in character, to-wit, the obligation to pay the mortgage debt, yet such a covenant may and does create other duties and obligations that may vitally affect the instrument containing the same as a conveyance of real property. For instance, it may qualify the grantor's covenants of the deed against incumbrances; it may preclude the grantee from impeaching the validity of the mortgage existing upon the property conveyed; it may render the grantee directly liable for the mortgage debt to the mortgagee or it may limit his liability to that of his grantor; it may have an important bearing upon the liability of a grantor in case of a subsequent extension of the mortgage without his consent.

And under such a clause may arise various questions of notice affecting those subsequently claiming under said deed, either as purchasers of the fee or of the mortgage indebtedness; the effect to be given to such a clause in a deed as to those subsequently acquiring an interest therein, either as purchasers or mortgagees, may depend largely upon the particular recording laws existing at the place where such deed is made and recorded.

Jones on Mortgages, 3d Ed., §§ 741 to 746,
And cases there cited.

Again, the bona-fide mortgagee or his assignee is entitled to the same protection as regards notice of what the records may show as a bona-fide grantee.

Pierce *v.* Faunce, 47 Maine, 507.

But the effect of such notice, either as to a mortgagee or grantee would depend almost entirely upon the recording laws of the place and the construction there placed upon them.

But even if such an assumption clause is considered strictly as a personal contract or covenant, and not embraced within the laws pertaining to realty and its conveyance and transfer, still its construction, interpretation, and effect must be determined and controlled by the law of the place where it was made and was to be performed.

"The general principle adopted by civilized nations is that the nature, validity, and interpretation of contracts are to be governed by the law of the country where the contracts are made or are to be performed."

United States *v.* Donnelly, 8 Peters, 368.

It certainly would be very incongruous to have two rules of interpretation in regard to the covenants of a deed, one in the state courts and a different one in the federal courts.

We hold then that if an assumption clause in a deed, in cases analagous to the present one, has been construed and interpreted by the courts of the State of Illinois, that such construction and interpretation is binding upon this court, either as establishing a rule of real property or as constituting the law of the place where the contract or covenant was made and was to be performed.

What the law is held to be, in regard to such assumption clauses in deeds as determined by the decisions of the courts of the State of Illinois, will appear in our consideration of the second point in our Brief.

SECOND POINT IN BRIEF.

(See page 2.)

It is an established fact that the Appellant Drury received and accepted the deed from his grantor, Daggett, containing the assumption clause in question.

(See Drury's Evidence, page 51 of printed record.)

A party must be presumed to know the contents and true meaning of a written instrument which he takes as evidence of title.

Freeman's Nat. Bank *v.* Savery, 127 Mass., 75.
Muhlige *v.* Fisk, 131 Mass., 110.

We claim the general doctrine to be: that a grantee, by the acceptance of a deed which provides that he shall assume and pay a specified mortgage, binds himself as effectually as he would by executing the deed himself as an indenture.

Such a provision becomes an express agreement on his part, for the fulfillment of which he is personally liable, not only to his grantor, but the benefit of it inures to the mortgagee, who may enforce it directly against such grantee.

Jones on Mortgages, § 752, 3d Edition.
And cases there cited.
Dean, use, etc. *v.* Walker *et al.*, 107 Ill., 540.

"The law may be regarded as well settled, that where A. has given a mortgage on a tract of land to B., and subsequently conveys to C., the deed containing a contract that C. assumes the mortgage and agrees to pay the same, that B. may compel the grantee to pay the mortgage indebtedness, either by a suit at law or by a bill in equity, foreclosing the

mortgage and a personal decree against the mortgagor and the purchaser of the mortgaged premises, for any deficiency."

Dean, use, etc. *v.* Walker *et al.*, 107 Ill., 540.

But in cases where the grantor of an assuming grantee is not personally liable for the mortgage debt, the law is not so well settled, generally, although it may be in particular States of this country. Just here a conflict of decisions arises, owing to the different doctrines prevailing as to the basis of an assuming grantee's liability.

Two leading doctrines prevail in regard to the basis of a grantee's liability, who has accepted a deed containing an assumption clause therein to the mortgagee or holder of the mortgage indebtedness.

The one is, that as between the parties to the deed, the grantee becomes the principal debtor for the mortgage debt, and thenceforward the grantor is merely surety for the debt; and on the principle that the creditor is entitled by way of equitable subrogation to all securities held by a surety of a principal debtor, the mortgagee is entitled to the benefit of the agreement; but such right is enforceable only in equity. The other is that where one person makes a promise to another, based upon a valid consideration, for the benefit of a third person, such third person may maintain an action on it, and such right is enforceable either at law or in equity, as the case may be.

In the states where the doctrine of equitable subrogation prevails as the basis of a grantee's liability, it is generally held that a grantee can not be made liable to the mortgagee or holder of the mortgage debt, unless his grantor is also personally liable for the same; whereas, in those states where

the basis of a grantee's liability is placed upon the doctrine of a promise to one on a valid consideration, for the benefit of a third person, it is not deemed necessary that the grantor should be personally liable for the mortgage debt in order to hold the grantee liable. The courts of the State of Illinois have uniformly placed a grantee's liability under assumption clauses in deeds similar to the one in question upon the latter of the above-mentioned doctrines. And they have farther held that such liability on the part of the grantee inures to the benefit of the mortgagee or of the holder of the mortgage indebtedness; and that such mortgagee or holder of the mortgage indebtedness may sustain an action at law against such grantee or recover a deficiency decree against him in a bill to foreclose the mortgage.

Bristow *et al. v.* Lane *et al.*, 21 Ill., 194.
Comstock *v.* Hitt, 37 Ill., 542.
Pigeon *v.* Trustees of Schools, 44 Ill., 501.
Fowler *v.* Fay, 62 Ill., 375.
Rogers *v.* Herron *et al.*, 92 Ill., 583.
Rapp *v.* Stoner *et al.*, 104 Ill., 618.
Dean, use, etc., *v.* Walker *et al.*, 107 Ill., 540.

A grantee's liability in an action at law at suit of mortgagee has been placed upon the same doctrine by Judge Blodgett in the case of Twichell *v.* Mears, 8 Bissell, 211, in the U. S. Circuit Court, Northern District of Illinois.

A grantee who had assumed a mortgage debt by virtue of an assumption clause in deed to him, was held liable to a deficiency decree in a suit brought by the mortgagee to foreclose the mortgage by Justice Harlan of this court in the case of Betts' Trustee *v.* Drew *et al.*, published in *Chi. Legal News*, Nov. 8th, 1879, and tried in the United States Circuit Court, Northern District of Illinois.

The following late cases of other States also place an assuming grantee's liability upon the doctrine that it is a promise to one for the benefit of a third person:

Hand *v.* Kennedy, 83 N.Y., 149.
Ross *v.* Kennison, 38 Iowa, 396.
Fitzgerald *v.* Barker, 70 Mo., 685.
Heim *v.* Vogel, 69 Mo., 529.
Bassett *v.* Hughes, 43 Wis., 319.
Urquhart *v.* Brayton, 12 R. I., 169.
Merriam *v.* Moore, 90 Pa. St., 78.
Brewer *v.* Maurer, 38 Ohio St., 543.

In each of the following cases it has been expressly decided that the grantee therein, who had assumed the mortgage debt by an assumption clause in deed to him, similar to the one in question, was liable to the mortgagee or holder of the mortgage debt, although his grantor was not personally liable for the same.

Heim *v.* Vogel, 69 Mo., 529.
Merriam *v.* Moore, 90 Pa. St., 78.
Brewer *v.* Maurer, 38 Ohio St., 543.
Dean, use, etc. *v.* Walker *et al.*, 107 Ill., 540.

The last case above cited was an action of assumpsit brought by Dean for use of Samuel H. Sweet and Charles Hutchinson against Edwin Walker to recover amount of certain bonds secured by mortgage on real estate in City of Chicago, which Walker had assumed and agreed to pay.

The facts are briefly as follows:

One Work being the owner of the premises, executed a trust-deed thereon to secure the payment of ten bonds of $1000 each. Afterward Work conveyed the premises by

warranty deed, without assumption clause, to Jenks. Afterward Jenks conveyed the premises to Dean for an expressed consideration of $27,504. This deed, after stating that grantor had not incumbered, etc., contained following assumption clause: "Except as to two certain deeds of trust (describing them), which said two trust-deeds and the indebtedness thereby secured are hereby assumed, to be paid by the said party of the second part."

Subsequently Dean, for an expressed consideration of $54,000, conveyed the premises to Walker, the deed containing the following assumption clause: "Subject, however, to the two trust-deeds (having previously described them), the taxes, and claims aforesaid, all of which the said party of the second part hereby assumes and agrees to pay as part of the consideration of this conveyance."

Sweet and Hutchinson were purchasers of a portion of the bonds secured by the deed of trust named in the assumption clause.

After discussing the equitable subrogation doctrine of an assuming grantee's liability, the court say:

"But is there no other principle of law upon which the grantee may be rendered liable upon a contract which he has deliberately made upon a valid consideration? We think there is; that it may be placed on the broad and well-settled principle that where one person makes a promise to another based upon a valid consideration for the benefit of a third person, such third person may maintain an action on it. It was a matter of no consequence to him (Walker) whether Dean was legally bound to pay those mortgages or not. It was enough that he, for a valuable consideration, assumed the mortgages and agreed to pay the same."

The Appellant Drury claims not to be liable to the appellee because his grantor Daggett never assumed the mortgage debt and was not personally liable for the same.

It is admitted that the deed to Daggett contained no assumption clause. Whether or not Daggett is liable by reason of the incumbrances forming a part of the purchase price of the premises conveyed to him, or that they were deducted from said purchase price, is a question that is involved in some doubt in this case by reason of the conflict of evidence in relation thereto.

But in the view we take of this case, it is not necessary to review the evidence on this point, for it raises an immaterial issue. Nor do we deem it necessary to determine by an examination of the various conflicting doctrines prevailing in our state courts as to the basis of an assuming grantee's liability, which is the correct one. The doctrine of *stare decisis* would seem to preclude such an inquiry in this case.

Adopting the language of the learned Judge, before whom this cause was tried, we say that "By the well-settled law of this State (Illinois), where this transaction took place and all the parties resided, the assumption of this indebtedness by Drury inured to the benefit of the mortgagee and could be enforced by him either at law or in equity."

Under the law then of the State of Illinois, where and when this transaction took place, and as recently fortified and re-affirmed by the Supreme Court of the State of Illinois in the case of Dean, use, etc. *v.* Walker *et al.* 107 Ill. 540. We hold that in determining appellant's liability to appellee, in this case, it is not necessary that his grantor, Daggett, should also be liable for the mortgage indebtedness. The

Court say, in the last-mentioned case, "But whether we are correct in this or not, we are satisfied that the rule that it is not necessary in order to a recovery that the grantor should be liable, is sound in principle and one which will promote the ends of justice and compel the due enforcement of contracts."

Such being the well-settled law of the State of Illinois, where the contract of assumption in question was made and was to be performed, and where all the parties thereto then resided, it is claimed that such law entered into and became a part of the contract, and that the parties are presumed to have contracted with reference to the same. And we further claim that such law is a rule of property in the State of Illinois, and as such it is binding upon this court.

Brine *v.* Insurance Co., 96 U. S., 627.

But it is also claimed that although appellant, by the terms of the deed agreed to assume and pay the mortgage indebtedness, yet inasmuch as the deed itself did not state that said indebtedness formed a part of the consideration of the conveyance, appellee could not maintain an action at law against appellant.

We quote from the opinion of Justice Gray, in Locke *v.* Homer, 131 Mass., 93, as bearing upon this point, although in that case the action was between grantor and grantee. But where it is held that the benefit of an assumption clause inures to mortgagee, the principle would be the same.

"The omission of the deed to state in so many words that the amount of the mortgage is a part of the consideration, makes no difference in the rights of the parties. Anything that the grantee is required by the terms of the deed

to pay or to do is a part of the consideration, whether so described in the deed or not. The right of action of the grantor against the grantee for the amount of the mortgage does not depend upon that amount being expressed to be a part of the consideration, but upon the terms and extent of the grantee's promise. If by the terms of the deed accepted by him he promises to pay it, he is liable whether it is described as a part of the consideration or not."

But it is also claimed that appellant never accepted the deed with knowledge of its contents, and hence the assumption clause is not binding upon him.

The deed from Daggett to appellant was dated April 12th, A.D. 1876, and filed for record in the Recorder's Office of Cook County, State of Illinois, on April 22d, 1876. (See pages 81 and 82, printed record.) The appellant admits that this deed was delivered to him a short time after it was made; that this deed and three others were executed at Chicago and brought down to him in Mercer County, Iliinois; that he read them over, but failed to notice the assumption clause in the deed.

(See Drury's Evidence, page 51, printed record.)

It also appears from appellant's testimony (p. 52, printed record) that in the spring of 1877, when he claims to have discovered the assumption clause in this deed, he was in possession of the property, for he says, "The deed (meaning the deed containing the assumption clause) was in Mr. Whipple's possession as agent, the man who was renting the property for me."

It also appears from appellant's testimony that he or his agents paid interest at various times upon the $12,000 encumbrance mentioned in the assumption clause in this deed.

(See pages 56, 57, and 58 of printed record.)

As a matter of fact, the acceptance of the deed was full and complete.

The law will imply a knowledge of the contents of an instrument from its acceptance and acting under it.

Blyer *v.* Monholland, 2 Sanf. Ch., 528.

A party must be presumed to know the contents and true meaning of written instruments which he takes as evidence of title.

Freeman's Nat. Bank *v.* Savery, 127 Mass., 75.
Muhlige *v.* Fiske, 131 Mass.

A purchaser who has made payments of interest upon a mortgage without complaining of the assumption clause in his deed, will not be heard afterward to urge in defence that this clause was fraudulently inserted in his deed.

Miller *v.* Thompson, 34 Mich., 10.
Jones on Mortgages, 3d Edition, § 744.
Parkins *v.* Sherman, 74 N.Y., 88.

III.

THIRD POINT OF BRIEF.

(See page 3.)

It is claimed by the appellant that by virtue of the instrument executed by his grantor, Daggett, to him, dated July 12th, A.D. 1877 (shown on page 81, printed record), and recorded on the 18th day of July, A.D. 1877, in the recorder's office of Cook County, Illinois, he was released from all liability under the assumption clause in the deed from Daggett

to him. "Whether or not the grantor can deprive the mortgagee of the benefit of a covenant made by the grantee who has assumed the payment of the mortgage debt, will in a large measure depend upon the ground upon which the mortgagee is allowed to take advantage of such a covenant."

Jones on Mortgages, 3d Edition, § 763.

The law, as near as it can be gleaned from the various decisions seems to be this: that where the conveyance is absolute to the grantee, and where the assumption contract is held to inure to the benefit of and vest in the mortgagee, it can not be released without the mortgagee's consent; but where said contract is considered a mere indemnity to the grantor, or where the mortgagee's rights therein must be worked out through the grantor, as for instance under the doctrine of equitable subrogation, then it may be released without the mortgagee's consent, unless rights of third parties have intervened.

Hence in those states where the benefit of an assumption contract is held to inure directly to a mortgagee, as in the State of Illinois, it is generally held that it can not be released without the consent of the mortgagee. And in those states it is also generally held that no express acceptance of the rights of such a contract is necessary on the part of the mortgagee; but such acceptance is presumed in the absence of proof to the contrary. In an elaborate opinion, reviewing all the principal cases on this point, the court says, in Douglass *v.* Wells, 18 Hun. (N.Y.), 88, "The cases seem to settle down on this, that where the conveyance is absolute to the grantee, his assumption therein of the payment of the mortgage debt resting as a lien upon the premises conveyed to him, creates against him an absolute obligation for its payment. The mortgagee is at once vested with a right to hold

him upon his assumption of the debt. Now no principle is clearer or better settled than this, that a release to be effectual must come from the party vested with the right. But it is urged that the right is not vested until there is an acceptance of the obligation. But in such cases an acceptance is a legal presumption in the absence of proof of actual dissent."

To the same effect are the following cases:

Campbell *v.* Smith, 71 N.Y., 26.
Rogers *v.* Goswell, 58 Mo., 589.
Crawford *v.* Edwards, 33 Mich., 354.
Miller *v.* Thompson, 34 Mich., 10.
Bassett *v.* Hughes, 43 Wis., 309.
Jones on Mtgs., 3d Edition, §§ 763, 764.
Parkinson *v.* Sherman, 74 N.Y., 88.
Swift *v.* Smith, 102 U. S., 442–449.
Davis *v.* Wells, 104 U. S., 159.
Betts' Trustee *v.* Drew *et al.*, U. S., Cir. Court, Northern Dist. of Illinois, opinion by Justice Harlan, and published in the *Chicago Legal News*, Nov. 8th, 1879,

In the last case cited it was held that the liability assumed can not be released without the consent of the mortgagee, after the acceptance of the new debtor, and that such acceptance may be presumed from the receipt of interest payments from the assuming grantee. Where it is held that an assuming grantee's liability is based upon the doctrine of a promise to one for the benefit of a third person and that such benefit inures directly to the mortgagee, as in the State of Illinois it is difficult to perceive upon what principle such a right or benefit can be released without the mortgagee's consent. But even under the doctrine of equitable subrogation considered as the basis of an assuming

grantee's liability, it is considered doubtful that a grantee can be released to the prejudice of one who has purchased the mortgage, relying upon the grantee's covenant as a part of the security.

Jones on Mortgages, § 764, 2d Ed.

It is alleged in the bill in this case (see page 4, printed record), and not denied by the answer (see pages 13, 14, and 15, printed record), and hence admitted that appellee purchased on or about the first day of November, 1876, before maturity and for a valuable consideration the two notes of $6000 each, secured by trust-deed to R. B. Bacon, dated July 28th, 1875, and mentioned and embraced in the assumption clause in question.

The instrument from Daggett to appellant, claimed as a release herein, was not recorded until July 18th, 1877.

(See printed record, pages 81 and 82.)

By the law of the State of Illinois, where this assumption clause was made and was to be performed and where all the parties thereto then resided, the benefit of said clause inured directly to the mortgagee, and he could have enforced it either at law or in equity.

The notes so purchased were negotiable in character and the mortgage security, as well as the security of the assumption clause, passed with the notes as incidents and accessories thereto free from any equities existing between the original parties.

Carpenter *v.* Lougan, 16 Wall, 271.
New Orleans, etc., Co. *v.* Montgomery, 95 U.S., 16.
Silverman *v.* Bullock *et al.*, 98 Ill., 11.

"A mortgage is *pro tanto* a purchase and the bona-fide

mortgagee is equally entitled to protection as the bona-fide grantee. So the assignee of a mortgagee without notice is on the same footing with a bona-fide mortgagee in all cases. The reliance of the purchaser is upon the record, and when that discloses an unimpeachable title, he receives the protection of the law as against unknown and latent defects."

Jones on Mortgages, § 710, 3d Ed..
Pierce *v.* Faunce, 47 Maine, 507.

When the mortgage notes were assigned to appellee the assumption clause stood upon the record. By the law of the State of Illinois it was then a valid and existing security, incidental and collateral to said notes, and the right to enforce the same was then vested in the mortgagee. As a purchaser of the mortgage notes, she is by law charged with notice of what the record contained in regard to the securities belonging thereto, and being so charged by law it is to be presumed that she purchased in reference thereto.

Appellee is not charged herein with actual notice, and she can not be charged with constructive notice of any defects in said assumption clause, under the recording laws of the State of Illinois. The statute of the State of Illinois as to the effect of recording instruments as to creditors, etc., is as follows:

"All deeds and mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same be filed for record."

R. S. of Illinois, 1874, chap. 30, § 30.

"Deeds, mortgages, and other instruments of writing relating to real estate, shall be deemed from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law," etc.

R. S. of Illinois, 1874, chap. 30, § 31.

When agreements in relation to land are recorded, the record is notice to third persons of their contents.

Mix *v.* White, 36 Ill., 484.

We claim then that the appellee was a bona-fide purchaser for value, and before maturity of the mortgage notes in question, and of the securities incident thereto, and without any notice either actual or constructive of any defects or equities pertaining thereto, and that as against the appellee's rights therein, the pretended release, shown on page 81 of printed record, was and is inoperative, null, and void.

IV.

FOURTH POINT OF BRIEF.

(See page 4.)

It is claimed as a defence herein that the appellant is not liable because the assumption clause in question was inserted in the deed through the mistake of the scrivener, who drew the deed, and contrary to the intention and agreement of the parties thereto.

But even if this assumption clause were inserted through mistake, we claim that the appellant can not avail himself of it as a defence against the rights of appellee herein.

The deed containing the assumption clause in question was

filed for record on the 22d of April, 1876. It stood unreleased of record until the 18th day of July, 1877, when the instrument claimed as a release was filed for record.

The appellee purchased the mortgage notes for a valuable consideration, and before maturity, on or before the first day of November, 1876. There is neither claim nor allegation that she purchased with notice, either actual or constructive that said assumption clause was improperly or mistakenly inserted in said deed.

The mortgage security, so purchased by her, was a second mortgage and secured upon premises then considered a scanty security for both encumbrances.

Such being the case, it is fair to presume that the assumption clause was one of the inducements to the purchase. At any rate, it stood upon the record, apparently a valid security, collateral to said notes, and she had a right to rely upon what the record disclosed.

We understand the law to be well settled in regard to mistakes in deeds and written instruments, *viz.:* that "as against bona-fide purchasers for a valuable consideration, without notice, courts of equity will grant no relief, because they have at least an equal equity to the protection of the court."

Kerr on Fraud and Mistake, p. 436.
Story's Eq. Jurisprudence, § 165, 10th Ed.
Sickman *v.* Wood, 69 Ill., 329.
Bowen *v.* Galloway, 98 Ill., 41–46.
New Orleans, etc., Co. *v.* Montgomery, 95 U. S., 16.

The court say in the case last cited: "The transfer of the notes carried with it to the transferrees the benefit of the security.

"The trustee in such cases like a mortgagee is a purchaser for a valuable consideration, etc.

"As between Montgomery, the grantor in the prior deed, and the *cestuis que trust* under that deed, the deed might be reformed; but this can not be done as against the intervening rights of others acquired in good faith."

In this case the appellant has never sought to reform said deed, and is not now asking to reform the same.

V.

FIFTH POINT OF BRIEF.

(See page 4.)

The court had jurisdiction of the parties and the subject matter, and it was competent for it to render a personal decree against the appellant for any balance due to the appellee over and above the proceeds of the sale of the mortgaged premises, if the appellant was found to be liable to the appellee for the mortgage debt.

The right to render such a decree is based upon the 92d rule in equity of the United States courts.

Justice Harlan, in the case of Betts' Trustee, etc. *v.* Drew *et al.*, in an opinion published in the *Chicago Legal News*, Nov. 8, 1879, in construing said rule, says, "If in a foreclosure suit any defendant has become liable to the complainant for the mortgage debt, I am unable to perceive why a personal decree may not be taken against that defendant."

"The object of the rule was to avoid multiplicity of suits and circuity of action. That object is subserved by so construing the rule as to authorize in all foreclosure suits a per-

sonal decree against any defendant who has become liable to the complainant for the mortgage debt." The filing of the supplemental bill and the facts therein set forth in no manner affected the *status* of the case or impaired the jurisdiction of the court to grant final and complete relief.

(See Supplemental Bill, pages 19 and 20 of printed record.)

RECAPITULATION.

I.

Assumption clauses in deeds are covenants and as such they are to be construed and interpreted according to the law of the State where they are made and are to be performed. When so construed and interpreted, such construction and interpretation constitute a rule of property, which will be respected and adopted by the Federal Courts.

II.

By the well-settled law of the State of Illinois, the acceptance of a deed, with knowledge of its contents, by a grantee, containing an assumption clause wherein he assumes and agrees to pay a specified mortgage indebtedness, imposes upon him a legal liability to pay such indebtedness, and the benefit of such liability inures directly to the mortgagee or to the holder of the mortgage indebtedness, who may enforce the same against such grantee either at law or in equity; and such is the case whether the grantor of such grantee is personally liable for such mortgage indebtedness or not.

III.

It is not competent for a grantor, who by an absolute deed has conveyed mortgaged premises to a grantee, who by an assumption clause therein has assumed and agreed to pay

certain negotiable notes secured by mortgage upon the premises conveyed, to release such grantee from liability thereunder, after a person has bought said mortgage notes for a valuable consideration and before maturity, and while said assumption clause stood unimpeached and unreleased upon the record.

IV.

A mistake, by which an assumption clause is inserted in a deed, contrary to the intentions and agreements of the parties thereto, can not be set up by the grantee therein as against a bona-fide purchaser for value, and without notice, of the mortgage debt.

V.

The Court below, having jurisdiction of the parties and of the subject matter, and having found that the appellant was liable to the appellee for the mortgage debt, and that the mortgaged premises had been sold under a foreclosure decree, to satisfy a prior encumbrance thereon, and that the security thereof had been entirely exhausted, it was compepetent for it, under the 92nd rule in equity, to render the decree it did.

VI.

In conclusion we would say that we have not deemed it necessary to refer to the cases cited by the counsel for the appellant in their voluminous and learned brief filed herein, for the reason that the greater part of the cases so cited are hopelessly in conflict with the decisions of the courts of the State of Illinois, and with the leading cases of the courts of other states cited herein, and that generally they are the decisions of courts holding radically different views in regard to the basis of an assuming grantee's liability than those entertained by the courts of the State of Illinois.

Entertaining the view, heretofore expressed by us herein, that the law of the State of Illinois governs and controls this case, we have deemed it unnecessary to review and comment upon them.

We submit, therefore, that the decree in this case should be affirmed; that by so doing, the sanctity of contracts will be upheld; that the rights of innocent and bona-fide purchasers, for value and without notice, will be respected and maintained, and that the ends of justice will thereby be promoted.

Respectfully,

ROSWELL B. BACON,
WILLIAM R. PAGE,
Counsel for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1883.

WILLIAM DRURY, *Appellant,*

vs.

ANNIE E. HAYDEN, *Appellee.*

Appeal from the Circuit Court of the United States, Northern District of Illinois.

REPLY FOR APPELLANT.

J. M. H. BURGETT, ABNER SMITH, U. P. SMITH,

COUNSEL FOR APPELLANT.

CHICAGO:
HORACE O'DONOGHUE, BOOK AND ABSTRACT PRINTER, 92-97 WASHINGTON ST.
1884.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

WILLIAM DRURY,
Appellant,

vs.

ANNIE E. HAYDEN,
Appellee.

Appeal from the Circuit Court of the United States, Northern District of Illinois.

REPLY FOR APPELLANT.

1. Question of liability of appellant is one of general jurisprudence. (*Post*, *p.* 2.)

2. Appellant not bound by payment of interest. No constructive notice of assumption clause. (*Post*, *p.* 2.)

3. Appellant not liable on the *notes*. Appellee had no notice of the alleged contract of assumption. There is no estoppel. (*Post*, *p.* 4.)

4. Appellee had no action at law. Appellee could only be subrogated to Daggett's rights against appellant. (*Post*, *p.* 6.)

5. Daggett's release valid and effectual. (*Post*, *p.* 11.)

I.

" A contract to assume an incumbrance on land pur-
" chased, is not one of the essential parts of a deed of
" conveyance; indeed, such a contract is a stranger to a
deed." It is a merely *personal* covenant of the grantee. (*Thompson* v. *Dearborn*, 107 Ill. 87, and cases cited in our former brief, page 42.) In determining the rights of the holder of a mortgage to enforce payment of the mortgage by a remote grantee of the mortgagor, who has agreed with his grantor to pay the mortgage, no rule of property is involved; the question is one of general jurisprudence, and decisions of State courts do not bind this court (see our former brief, page 14).

II.

Counsel for appellee cites several cases to show that after the purchaser has paid interest on the incumbrance he cannot deny the validity of a clause in the deed to him reciting that he has agreed to pay such incumbrance. In the present case, Drury paid the interest before he was aware that the deed contained the assumption clause; and, therefore, such payment was no recognition of the validity of such clause (*Elliott* v. *Sackett*, 2 Supreme Ct. Reporter, 375,382; former brief, pp. 39 40). The record of the deed did not give " constructive notice " to Drury of the presence of such clause in the deed, since such clause is a stranger to a deed of conveyance (*Thompson* v. *Dearborn*, 107 Ill. 87); moreover, " it is not the purpose " of the recording acts to charge the *immediate* parties with " constructive notice of the precise contents of the instru-
" ments they execute." (*Mead* v. *Bunn*, 32 N. Y. 275, 276, 278). Further: the deed was prepared by Daggett, by whom alone it was signed, and Drury had a right to

suppose that it had been drawn in accordance with the agreement between him and Daggett (*Elliott* v. *Sackett*, and other cases cited in former brief, at p. 34). Drury's testimony shows that he did not "accept" the deed with knowledge that it contained the assumption clause. (See testimony, former brief, p. 10.) The reception and retention of a paper are simply *evidence* of acceptance; they are not the same thing, or conclusive of it. To conconstitute acceptance, it must not only appear that the deed, with the assumption clause, was handed over by the grantor to the grantee *with the understanding that it should be effective*, but was also *received by the grantee as a binding thing*. The mechanical transit of the deed containing the clause is not enough. An *intelligent assent* to the terms of the deed is necessary. A person's assent to a matter which is obviously for his benefit may be presumed, but his assent cannot be presumed where it would be prejudicial, or subject him to a duty. There was no presumption from the record of the deed that it was accepted by Drury, with its bu.den, and there is no allegation in appellee's bill that the deed was delivered to Drury, or filed for record by him, which allegation would, at least, be necessary to bind him by estoppel.

Thompson v. *Dearborn*, 107 Ill. 87.
Higman v. *Stewart*, 38 Mich. 513.
Former Brief, pp. 43, 16.

As to cases cited in brief of appellee: In *Miller* v. *Thompson*, 34 Mich. 10, cited in Jones on Mortgages to support the text (§ 744), the court says: "Thompson's "conduct after he admits being made aware of the exact "terms of the deed was inconsistent with the defense now "set up. *He made no complaint for a year and a half,*

" making in the meantime payments of interest on the " mortgage in full recognition of the amount which the " deed made chargeable upon him."

In *Crawford* v. *Edwards*, 33 Mich. 354, 362, there was evidence to show that the purchaser knew how the deed was drawn, and expressly agreed to pay the mortgage. *Parkinson* v. *Sherman*, 74 N. Y., and *Freeman's Bk.* v. *Savery*, 127 Mass., are not in point. In *Coolidge* v. *Smith*, 129 Mass. 554, 558, the grantee's husband was her general agent in buying and selling land, and he knew of the exact wording of this deed when taken by him, and there was no disavowal by her of the clause for more than two years, nor *until called upon to pay the mortgage;* the terms of the deed had not been misrepresented to her; she had no reason to suppose them to be otherwise than they were. In *Muhrlidge* v. *Fiske*, 131 Mass. 110, 113, there had been no previous agreement of the parties with which the terms of the deed were in conflict, and there was no suggestion of fraud or mistake in the execution or delivery of the deed. In *Blyer* v. *Moxholland*, 2 Sandf. Ch., the court say, p. *480: " Nor is there proof that he " did not, at the time of the delivery of the deed, know " its contents fully."

III.

Counsel for appellee contends that appellee is a *bona fide* purchaser of the notes without notice, and, therefore, took the same free of defenses.

We concede that she took the notes free of defenses thereto. But appellant is not trying to defeat an action on the notes or mortgage. We do not dispute that the notes were a valid lien on the property. But it cannot be maintained that appellant is liable upon the notes; his

name does not appear upon them. If liable at all, it is upon the assumption clause or pretended contract contained in the deed from Daggett. (See our former brief. pp. 56, 32.) Appellant is not liable as the maker or indorser of commercial notes. The courts all hold (see former brief, pp. 24, 31, 47, 55), that whether the mortgagee be permitted to maintain an action at law or in equity, his right is purely derivative, and is simply the right of substitution in place of the promisee (purchaser's grantor), subject to all equities between the purchaser and his grantor. We have shown in our former brief (pp. 32–36, 56–60), that no case for the application of the doctrines of estoppel was made out in the bill or in the evidence. It was not even proved that appellee paid a valuable consideration for the notes, or put herself in a worse situation after the conveyance to Drury than she was in before. As the action is not upon the notes, but upon the alleged contract of assumption in the deed, and the notes are evidence, not of the alleged contract, but simply of the amount of the debt to be paid, it was necessary that appellee prove that she paid value for the notes (*see former brief, p. 32, 35, 56, 59*), before a decree in her favor could be sustained upon the doctrines of estoppel.

There is no allegation in the bill, nor evidence, that when the notes were assigned to appellee she knew of the conveyance to Drury, or his alleged assumption of incumbrances. As appellee derives no claim to the property through or under Daggett, he not being in the line of title to the mortgage, and nothing Daggett might do could in anywise affect or impair the lien of the mortgage made and recorded by Solomon Snow the year before, there was no "constructive notice" to appellee of the deed to

In *Dean* v. *Walker*, 107 Ill. 540, cited by appellee's counsel, there was no argument of the cause on behalf of the purchaser until the Supreme Court had filed an opinion reversing the judgment of the court below. Of this fact we have personal knowledge. After the Supreme Court had taken a position on the question involved, the counsel for the purchaser filed a petition and argument for a rehearing. On the rehearing (there was no oral argument) SHELDON, Ch. J., and DICKEY, J., dissented from the majority opinion, and held, as did the trial court, that it was essential to the recovery by the mortgagee that the purchaser's vendor be personally liable for the mortgage debt. It will be noted, also, that the suit was brought, not in the mortgagee's name, but by the purchaser's *vendor*, for the use of the mortgagee.

In *Brewer* v. *Maurer*, 38 Ohio St. 543, 549, 554, cited by appellee's counsel (p. 11), the court held that the mortgagee had no vested right in the agreement of the purchaser with his vendor, and that such vendor might release the purchaser from his agreement at any time before the mortgagee signified his acceptance of and assent to the purchaser's agreement and intent to look to him for the payment of the mortgage.

In *Merriam* v. *Moore*, 90 Pa. St., *Brewer* v. *Maurer*, 38 Ohio St. 543, 549, *Dean, use, etc.*, v. *Walker*, 107 Ill., the purchaser did not purchase simply *the equity of redemption* as did Drury in the present case, but bargained for the land, and the amount of the incumbrance was deducted from the purchase price agreed to be paid, and left in the purchaser's hands for the payment of the mortgage (*see our former brief, pp. 20, 21, 46*).

It is well settled, that where money or property has been delivered by one person to another (or the proceeds

thereof) the latter promises, either expressly or by implication from the acceptance of the money or property without objection to the terms on which it is delivered to him, to pay to a third person then designated, such money or property belongs in equity to such third person, and suit may be maintained by him upon the implied understanding which the law raises from the possession of his property; and, in cases of this kind, it may not be essential that the relation of debtor and creditor exist between the promisee and the plaintiff.

Prather v. *Vineyard*, 4 Gilman, 40, 48.
Walden v. *Karr*, 88 Ill. 49.
Ellison v. *Ellison*, and notes thereto in 1 Lead. Cases in Eq., 4th Am. ed., pt. 1, p. 382.
Mellen v. *Whipple*, 1 Gray, 317, 322.

The cases cited by appellee's counsel, *Merriman* v. *Moore*, *Brewer* v. *Maurer*, and *Dean, use, etc.* v. *Walker*, do not observe the distinction between the case of a *mere promise* to A to pay B a sum of money, and the case where money has been received from A for the use of B, to whom it is to be delivered, two such different things (see *Tweddell* v. *Tweddell*, and *Barham* v. *Thanet*, *supra*, *p.* 7; *Mellen* v. *Whipple*, 1 Gray, 317, 322, 324; *Campbell* v. *Findley*, 3 Humph. 329, 332; 2 Am. Lead. Cases, 5th Ed. 213), that they cannot be placed in the same category. On the sale of mortgaged premises, the purchaser acquires the *absolute ownership* of the property, and there is no fund placed in his hands for the mortgagee; the purchaser receives nothing belonging to the mortgagee from the possession of which the law can raise an implied promise to pay over money to him. If the purchaser becomes liable to an action, his liability is purely *ex contractu*, and

there is neither privity of contract nor of consideration between him and the mortgagee

Mellen v. *Whipple*, 1 Gray, 317, 324.
Douglass v. *Wells*, 18 Hun, 88, 96, per Larned, P. J.
Prentice v. *Brimhall*, 123 Mass. 291, 293, and other cases cited in our former brief, p. 21.

In *Heim* v. *Vogel* (69 Mo.), cited by appellee's counsel, what is said about personal liability on the part of Sternberg to the mortgagee, is pure *dicta*. The case was *ejectment*. Sternberg bought premises of Dette, and took deed reciting that premises were subject to trust deed to Hammel, giving book and page where recorded, and recited that he assumed payment of the trust deed. When S. bought premises, a proceeding to enforce a mechanic's lien was pending, and afterwards the premises were sold to satisfy the lien, and bought in by S., the owner. Obviously, the purchase by the *owner* did not cut off the trust deed to Hammel; the owner of property subject to two mortgages, although he may not be personally liable for their payment, cannot let the property go to sale under the first, and buy it in, and thus cut off the lien of the second. Then S. gave trust deed to Heim, which described property as being same that S. had acquired from Dette by deed, bearing date, etc. Afterwards Vogel purchased premises at sale under Hammel trust deed, and later Heim sold the property under his trust deed, and bought it in. *Held*, Heim having notice of the Hammel trust deed took subject thereto, and Vogel had right of property.

V.

As shown above, and in our former brief, the release from Daggett to appellant was not essential to his defense, he not having agreed to pay the mortgage, and Daggett not having been liable for the payment of the mortgage.

But if it were necessary to his defense, the release was valid and released appellant from all liability to pay the mortgage. (See our former brief, pp. 24, 29, 48, 52–3.) Drury paid no interest after he became aware of the presence of the assumption clause in the deed. In *Betts* v. *Drew*, 12 C. L. N. 65, the purchaser had paid interest to the mortgagee (see *supra*, p. 7), and moreover, all that was there held was that the assignee in bankruptcy of the purchaser's vendor could not release the assuming purchaser without authority of court.

In *Douglass* v. *Wells* (18 Hun. 88) the court was composed of three judges; and BOARDMAN, J., says, "I "concur in the opinion (only) as a necessity from (my "understanding) of the authorities in this State;" and LARNED, Presiding Justice, dissents in an able opinion. It is now held in New York that the purchaser's vendor can release him from all liability under an assumption clause in his deed, at any time before a communication between the purchaser and the mortagee, and the latter's assent to, and acceptance of, the purchaser's promise (see our former brief, p. 27–9, 51–3).

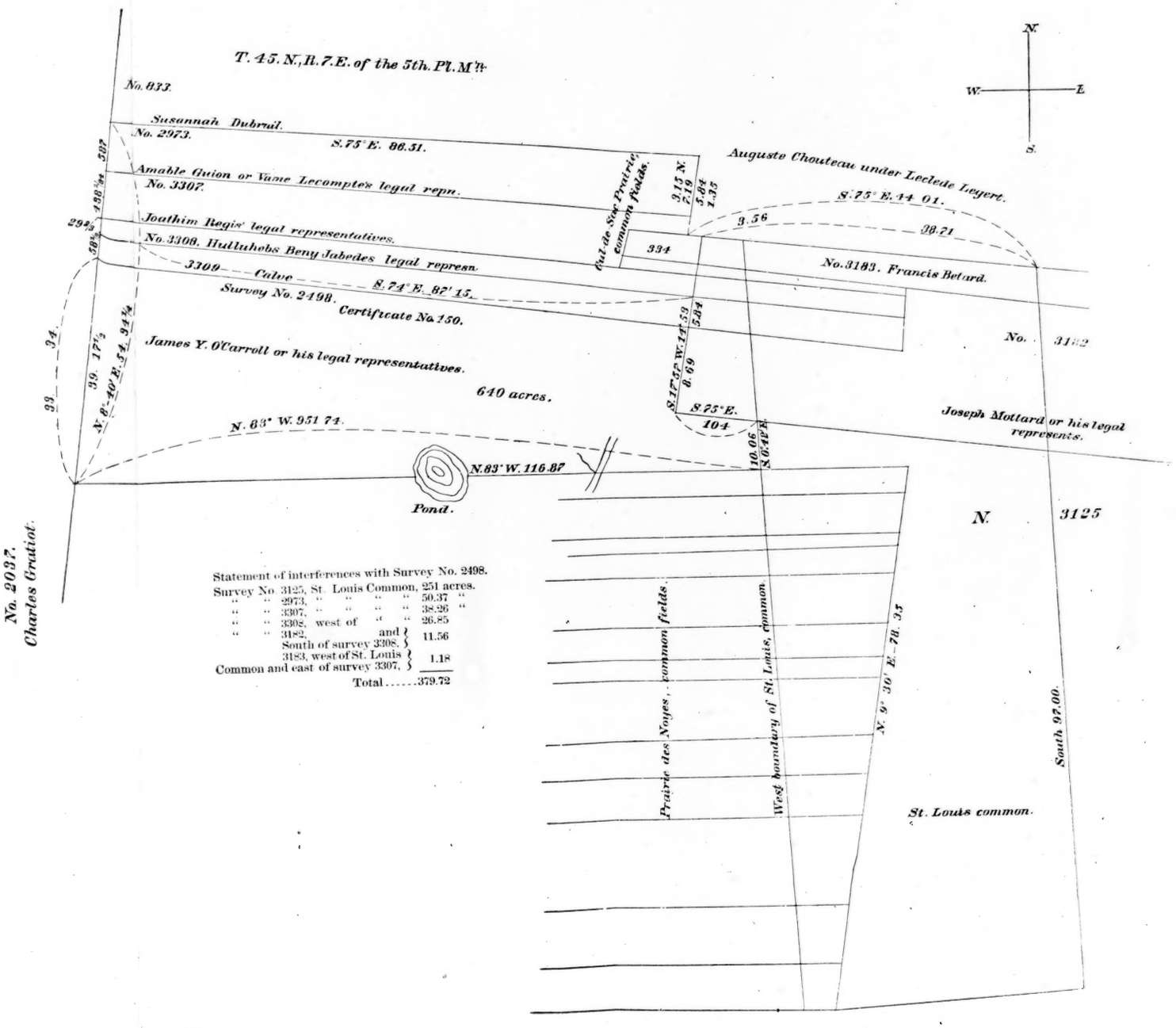
Bassett v. *Hughes*, 43 Wis. 309, simply says the purchaser's vendor cannot release him from liability after communication between the mortgagee and the purchaser, and the mortgagee has signified his assent to and acceptance of the purchasers agreement.

Rogers v. *Goswell*, 58 Mo., is based on overruled cases and is contrary to *Ridge* v. *Olmsted*, 73 Mo., and *Briggs* v. *Block*, 18 Mo. (*See our former brief, pp. 50, 51, 27.*)

We have here noticed all of the cases cited by counsel for appellee, that have any bearing on the questions involved in the present case.

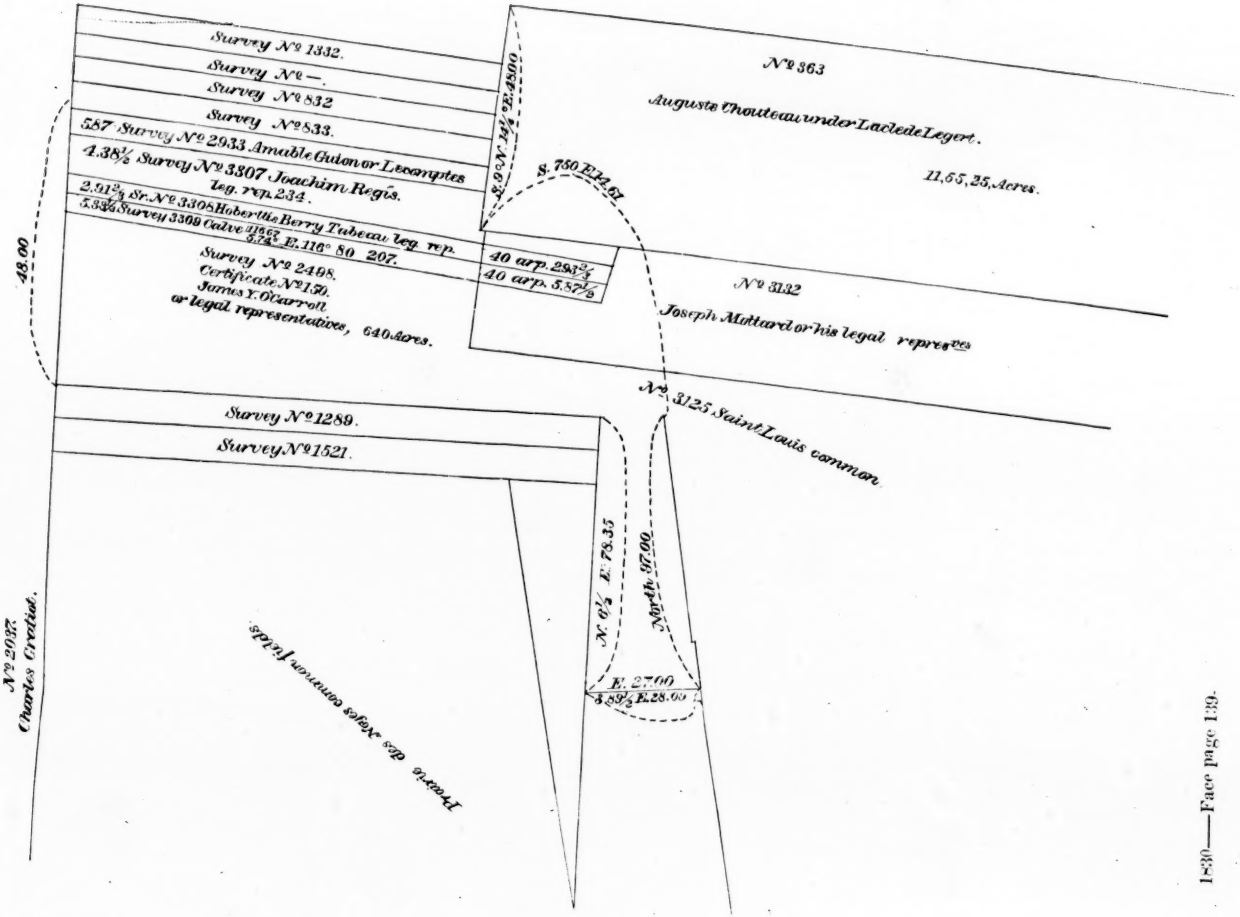
Respectfully submitted,

J. M. H. BURGETT,
ABNER SMITH,
U. P. SMITH,
Counsel for Appellant.



Statement of interferences with Survey No. 2498.

Survey No. 3125, St. Louis Common,		251 acres.
" " 2973, " " " "		50.37 "
" " 3307, " " " "		38.26 "
" " 3308, west of " "		26.85
" " 3182, and South of survey 3308,		11.56
3183, west of St. Louis Common and east of survey 3307,		1.18
Total		379.72



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